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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 780

ELVA MAE REELEY, WIDOW, AND ON BEHALF OF THE THREE INFANT CHILDREN OF THE LATE GEORGE A. REELEY, DECEASED,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND, AND BRIEF IN SUPPORT THEREOF.

ISAAC LOBE STRAUS,
Munsey Building,
Baltimore, Maryland,
Counsel for Petitioner.

AVRUM K. RIFMAN,
Munsey Building,
Baltimore, Maryland,
Of Counsel.

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SUBJECT INDEX.

PAGE

Petition for writ of certiorari 1

A. Statement of the matter involved 1

B. Jurisdictional statement 11

C. The questions presented 12

D. Reasons relied on for the allowance of the writ 14

Brief in support of Petition for Writ of Certiorari 19

I. Opinions below 19

II. Jurisdiction 19

III. Statement of the case 20

IV. Specification of errors 20

V. Argument 23

Summary of Argument 23

Point 1 28

Point 2 34

Point 3 39

Point 4 43

Point 5 50

Conclusion 57

TABLE OF CASES CITED.

Balto. & Ohio C. T. R. Co. v. *Industrial Commission*, 366 Ill. 223, 8 N. E. (2) 642 34

Balto. & Ohio S. W. R. Co. v. *Burtch*, 263 U. S. 540 43

Baughman v. *Grand Trunk Western R. Co.*, 271 Mich. 244, 259 N. W. 897 52

Berry v. *St. Louis & S. F. Ry. Co.*, 324 Mo. 775, 26 S. W. (2) 988, cert. den. 281 U. S. 765 43

Boston & M. R. Co. v. *Armburg*, 285 U. S. 234 48

Chicago, B. & Q. R. R. Co. v. *Harrington*, 241 U. S. 177 ..... 31, 56

Chicago & E. I. R. Co. v. *Industrial Commission*, 284 U. S. 296 ..... 34, 56

Chicago Junction Ry. Co. v. *Industrial Board*, 277 Ill. 512, 115 N. E. 647 52

Chicago & N. W. Ry. Co. v. *Bolle*, 284 U. S. 74 ..... 33, 55, 56

Chicago, R. I. & P. Ry. Co. v. *Devine*, 239 U. S. 52 12

Colangelo v. *Pittsburgh & L. E. R. Co.*, 336 Pa. 490, 9 A. (2) 391 35

Cox v. *Missouri Pac. R. Co.*, 332 Mo. 991, 61 S. W. (2) 962 46

Delaware L. & W. R. Co. v. *Peck*, 225 F. 261 (C. C. A.) 50

PAGE

Erie R. R. Co. v. *Collins*, 253 U. S. 77 56
Erie R. R. Co. v. *Szary*, 253 U. S. 86 56
Erie Railroad Co. v. *Welsh*, 242 U. S. 303 ..... 32, 41
Flack v. *Delaware, L. & W. Co.*, 45 F. (2) 683 (C. C. A. 2) 43
Geraghty v. *Lehigh Valley R. Co.*, 70 F. (2) 300 (C. C. A. 2), 11 F. Supp. 378 (D. C. N. Y.), 83 F. (2) 738 (C. C. A. 2) 50
Gidley v. *Chicago Short Line Ry. Co.*, 346 Ill. 122, 178 N. E. 399, cert. den. 285 U. S. 554 35
Grigsby v. *Southern Ry. Co.*, 3 F. (2) 988 (C. C. A. 6), cert. den. 268 U. S. 704 45
Gunning v. *Cooley*, 281 U. S. 90 ..... 36, 40
Heffner v. *Pennsylvania R. Co.*, 81 F. (2) 28 (C. C. A. 2) 52
Howard v. *Mobile & O. R. Co.*, 335 Mo. 295, 73 S. W. (2) 272 43
Illinois Cent. R. R. Co. v. *Behrens*, 233 U. S. 473 ..... 31, 41
Illinois Cent. R. R. Co. v. *Peery*, 242 U. S. 292 ..... 33, 41, 43
Industrial Accident Comm. v. *Davis*, 259 U. S. 182 ..... 12, 34, 49
Jarvis v. *Chicago, B. & Q. R. Co.*, 327 Mo. 428, 37 S. W. (2) 602, cert. den. 284 U. S. 635 52
Kinzell v. *Chicago, M. & St. P. Ry. Co.*, 250 U. S. 130 12
Konsoute v. *Pennsylvania Railroad Co.*, 287 Pa. 302, 135 A. 209, cert. den. 273 U. S. 747 34
Kraemer v. *Chicago & N. W. Ry. Co.*, 148 Minn. 310, 181 N. W. 847, 186 N. W. 392 52
LaLone v. *St. Louis M. B. T. Ry. Co.*, 316 Mo. 835, 293 S. W. 379, cert. den. 275 U. S. 524 43
Lavigne v. *Chicago, M. & St. P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2) 785, and cases cited, cert. den. 302 U. S. 688 52
Lawrie v. *Atlantic City R. Co.*, 3 N. J. Misc. 267, 127 A. 818 50
Lehigh Valley Railroad Co. v. *Barlow*, 244 U. S. 183 ..... 41, 53
Louisville & N. R. Co. v. *Strange's Admx.*, 156 Ky. 439, 161 S. W. 239.. 50
Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13 42
Mayer v. *Union R. Co.*, 256 Pa. 474, 100 A. 967, cert. den. 243 U. S. 656. 50
Mayor v. *Central Vermont Ry. Co.*, 26 F. (2) 905, aff. 26 F. (2) 907 (C. C. A. 2), cert. den. 278 U. S. 624 49
McBain v. *Northern Pac. Ry. Co.*, 52 Mont. 578, 160 P. 654 52
McCoy v. *Southern Pac. Co.*, 29 Cal. A. 16, 83 P. (2) 970, cert. den. 307 U. S. 626 35
McDermott v. *Chicago & N. W. Ry. Co.*, 124 Neb. 727, 248 N. W. 59..... 50
Mease v. *Reading Co.*, 126 Pa. Super. 436, 191 A. 402, cert. den. 302 U. S. 705 46
Mellon v. *Weber*, 115 Oh. St. 91, 152 N. E. 753 43
Middleton v. *Southern Pac. Co.*, 61 F. (2) 929 (C. C. A. 5), cert. den. 289 U. S. 736 46
Minneapolis & St. Louis R. R. Co. v. *Winters*, 242 U. S. 353 ..... 34, 53
Mississippi Cent. R. Co. v. *Knight*, 138 Miss. 621, 103 So. 377, cert. den. 269 U. S. 559 50
Missouri Pac. R. Co. v. *Industrial Commission*, 348 Ill. 355, 180 N. E. 912 46
Mitchell v. *Louisville & N. R. Co.*, 305 Ill. A. 635, 27 N. E. (2) 861.... 35
Murray v. *Pittsburgh C., C. & St. L. R. Co.*, 263 Pa. 398, 107 Atl. 21.... 46
New York Cent. & H. R. R. Co. v. *Carr*, 238 U. S. 260 48

PAGE

New York Cent. R. Co. v. *Marcone*, 281 U. S. 345..... 42
New York Cent. R. R. Co. v. *White*, 243 U. S. 188..... 34
New York, N. H. & H. R. Co. v. *Bezue*, 284 U. S. 415..... 33, 48
North Carolina R. R. Co. v. *Zachary*, 232 U. S. 248..... 33, 36, 41
Osborne v. *Gray*, 241 U. S. 16..... 37
Painter v. *Balto. & O. R. Co.*, (Pa. 1940), 13 A. (2) 396, cert. den. Oct. Term, 1940..... 46
Palermo v. *Erie R. Co.*, 173 N. Y. Supp. 456, 185 App. Div. 656..... 43
Pedersen v. *Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146..... 34, 43
Pennsylvania Co. v. *Donat*, 239 U. S. 50..... 43
Pennsylvania Railroad Co. v. *Stallings*, 165 Md. 615, 170 A. 163..... 35
Philadelphia & R. Ry. Co. v. *Berman*, 295 F. 658 (C. C. A. 3)..... 43
Phillips v. *Union Terminal Ry. Co.*, 328 Mo. 240, 40 S. W. (2) 1046, cert. den. 284 U. S. 660..... 36
Pope v. *Utah-Idaho Cent. R. Co.*, 54 F. (2) 575 (C. C. A. 10)..... 46
Raymond v. *Chicago, M. & St. P. Ry. Co.*, 243 U. S. 43..... 34
Red Cross Line v. *Atlantic Fruit Co.*, 264 U. S. 109..... 36
Reif v. *Schumacker, et al.*, (Cal. 1940), 102 P. (2) 375..... 35
Rice v. *Baltimore & O. R. Co.*, 42 F. (2) 387 (C. C. A. 6)..... 46
Richmond & Danville R. R. Co. v. *Powers*, 145 U. S. 43..... 40
Roberson v. *St. Louis M. B. T. Ry. Co.*, 201 Mo. App. 672, 213 S. W. 873. 43
Rogers v. *Canadian Nat. Ry. Co.*, 246 Mich. 399, 224 N. W. 429, cert. den. 280 U. S. 554..... 52
Russell v. *St. Louis, S. F. Ry. Co.*, 336 Mo. 845, 81 S. W. (2) 621..... 34
St. Louis & S. F. Ry. Co. v. *Fraser*, 75 Okla. 265, 183 P. 478..... 43
Schauffele v. *Director General*, 276 F. 115 (C. C. A. 3), cert. den. 257 U. S. 661..... 45
Seaboard Air Line Ry. v. *Koennecke*, 239 U. S. 352..... 43
Seaboard Air Line Ry. v. *Padgett*, 236 U. S. 668..... 12
Second Employers' Liability Cases, 223 U. S. 1..... 30, 45
Seyle v. *Charleston Terminal Co.*, 106 S. Car. 215, 90 S. E. 1016, 109 S. Car. 99, 95 S. E. 178..... 43
Shanks v. *Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556..... 33, 56
Siegel v. *Missouri-K.-T. R. Co.*, 342 Mo. 130, 119 S. W. (2) 376, cert. den. 305 U. S. 654..... 46
Smith v. *Interurban Ry. Co.*, 186 Iowa 1045, 171 N. W. 134, cert. den. 251 U. S. 552..... 50
Smith v. *Salt Lake & U. R. R. Corp.* (Utah, 1940), 105 P. (2) 338..... 43
Southern Pac. Co. v. *Industrial Acci. Comm.*, 251 U. S. 259..... 12, 34
Southern Pac. Co. v. *Middleton*, 54 F. (2) 883 (C. C. A. 5)..... 45
Southern Pacific Co. v. *Schuyler*, 227 U. S. 601..... 36
Southern Railway Co. v. *Lloyd*, 239 U. S. 496..... 41
Spencer v. *Chicago & N. W. Ry. Co.*, 336 Ill. 560, 168 N. E. 686, cert. den. 281 U. S. 736..... 46
Texas & Pacific Ry. Co. v. *Cox*, 145 U. S. 593..... 36
Tipton v. *Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141..... 36
Toledo, St. Louis & West. R. R. Co. v. *Slavin*, 236 U. S. 454..... 12
United States v. *Lowden*, 308 U. S. 225..... 47
Van Brimmer v. *Texas & P. Ry. Co.*, 190 F. 394 (D. C. Tex.)..... 46
Voelker v. *Delaware, L. & West. R. Co.*, 31 F. Supp. 387 (D. C. N. Y.).. 36

PAGE

Western & Atlantic R. R. v. *Hughes*, 278 U. S. 496..... 37
Wichita Falls & Southern R. R. Co. v. *Holbrook*, 125 Tex. 184, 78 S. W. (2) 938, cert. den. 296 U. S. 618..... 38
Wichita Falls & S. R. Co. v. *Lindley*, (Tex. 1940), 143 S. W. (2) 428.. 46
Winfree v. *Northern Pac. Ry. Co.*, 227 U. S. 296..... 46
Wise v. *Lehigh Valley R. Co.*, 43 F. (2) 692 (C. C. A. 2)..... 45

STATUTES CITED.

Federal Employers' Liability Act (U. S. C. Tit. 45, Sec. 51, et seq.). 3, 11, 20
Section 1 ..... 23, 28, 30, 32, 45
Amendment of August 11, 1939 (53 Stat. 1404)..... 46
Judicial Code, Section 237(b)..... 11, 19
Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101)..... 3, 11
Section 44..... 35
Section 70 3
Section 79 35

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Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Elva Mae Reeley, widow, and on behalf of the three infant children of the late George A. Reeley, deceased, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeals of Maryland rendered in the above cause on December 18, 1940.

A.

STATEMENT OF THE MATTER INVOLVED.

The Court of Appeals of Maryland, reversing without a new trial the judgment rendered on a verdict and specific findings of a jury that a deceased employee was, at the

time he received injuries resulting in his death, engaged in intrastate work to the extent that it was clearly separable and distinguishable from any interstate transportation in which he had previously been engaged, and that such interstate transportation had terminated prior to his being injured, held that the trial Court erred in allowing the jury to pass on the questions of fact involved in the determination of the status of the deceased employee at the time of his injuries, and that the trial Court should have instructed the jury that, as a matter of law, the uncontradicted evidence in the case showed that the deceased was engaged in interstate commerce at the time of his injuries and death. That there was an interstate movement of ore by train from Harrisburg, Pennsylvania, to the Canton ore piers in Baltimore, Maryland, and that deceased worked as brakeman on said train *previous* to the time of his injuries and death, is, as the trial Court plainly found and stated (R. 141), not disputed. As the jury found, however, and, we submit, as the evidence clearly shows, the interstate character of the work in which deceased had previously been engaged, and all of his interstate duties, had for all purposes ceased and terminated at the Canton yards prior to the time of his injuries, and at said time he was not engaged in interstate transportation or in work so closely related to it as to be practically a part of it but was, pursuant to detailed and specific orders of his employer, engaged in intrastate work clearly separable and distinguishable from his previous activities. Moreover, the instrumentalities, namely, the engine and tender, upon which deceased was in attendance had been, at the time of his injuries, so far as the evidence shows, completely withdrawn and retired from interstate transportation, and Respondent did not attempt to show any other, different or contemplated future use thereof, although all evidence on that subject was exclusively within Respondent's knowledge and power to adduce.

The cause originated when Petitioner, Elva Mae Reeley, widow of George A. Reeley, deceased, and mother of their

three infant children, all dependents of the deceased, sought compensation (R. 6, 9) for herself and said infant dependents pursuant to the provisions of the Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101) from The Pennsylvania Railroad Company, Respondent, his employer, for his death resulting from accidental personal injuries sustained by him arising out of and in the course of his said employment by Respondent as a brakeman. Respondent, a self-insurer (R. 9) conformably to other provisions of the Maryland Act, contested the claim and State jurisdiction by invoking, as exclusively controlling of the rights and liabilities of the parties and as determinative of the validity of the claim for compensation, the provisions of the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*); and in furtherance of its defense under the Federal Act requested that the State Industrial Accident Commission of Maryland, before which body the matter initially came on for hearing, decide, as Respondent's issue (R. 9): "Whether or not George A. Reeley, deceased employee, was engaged in *interstate commerce* at the time of the alleged injury". The Commission held that it had no jurisdiction because deceased was engaged in interstate commerce, and found for Respondent on the issue thus presented, which was the sole issue decided by it, which resulted in the disallowance of the claim for compensation (R. 9).

Thereafter, as authorized by Section 70 of said Article 101 of the Maryland Code, Petitioner seasonably filed an appeal (R. 3) from the decision of the Commission to the Superior Court of Baltimore City and elected to have the questions of fact involved in the case submitted for determination by a jury. Proposed issues of fact of Petitioner (R. 3-4) and of Respondent (R. 4) were filed and, each opposing party having excepted to the other's proposed issues, the trial Court ruled (R. 5) that the cause be tried and submitted to the jury upon two issues of fact, Peti-

tioner's proposed issues Nos. 3 and 4, namely: "Was the decedent, George A. Reeley, at the time of the accidental personal injury resulting in his death, on the 21st day of November, 1937, engaged in intrastate work to the extent that it was clearly separable and distinguishable from his interstate work"; and "Did the employment of George A. Reeley, decedent, in interstate commerce as such, terminate when the cars were 'cut off' at the Canton yards on the 21st day of November, 1937, preceding his accidental personal injury and death". The case was tried before the Court and a jury upon the transcript of testimony taken before the Commission, additional testimony of witnesses, and exhibits.

Upon the conclusion of the evidence Respondent requested the trial Court to rule and to instruct the jury that, as a matter of law, the uncontradicted evidence in the case showed that the deceased was engaged in "interstate commerce" at the time of his death and the answers to the issues submitted should be in the negative, which request was by the trial Court refused (R. 146). Respondent then requested the trial Court to instruct the jury that the decision of the Commission was *prima facie* correct and that, therefore, Petitioner had the burden of proving that her husband, the deceased, was not engaged in interstate commerce, which request was by the trial Court granted (R. 144).

At the request of Petitioner the trial Court instructed the jury (R. 144-146) that if it found from the evidence that at the time Reeley sustained the accidental personal injuries resulting in his death he was engaged in intrastate work to the extent that it was clearly separable and distinguishable from his interstate work, then the answer of the jury to the first issue submitted to it should be in the affirmative; further, that if the jury found from the evidence that the employment of deceased, in interstate commerce as such, terminated when the sixty-two freight cars were cut off at the Canton yards on November 21,

1937, and thereafter the deceased sustained an accidental personal injury resulting in his death, and arising out of and in the course of his employment by Respondent, while engaged in intrastate work, then the answer of the jury to the second issue submitted to it should be in the affirmative; and, finally, that while the decision of the Commission was *prima facie* correct, yet if the jury was satisfied by a preponderance of the testimony that deceased sustained the accidental personal injuries resulting in his death, which arose out of and in the course and scope of his employment by Respondent, and that at the time deceased sustained said injuries he was not engaged in interstate transportation or in work so closely related to it as to be practically a part of it, then the answer of the jury to both issues submitted to it should be in the affirmative.

The verdict of the jury was an affirmative answer to each of the issues submitted to it, resulting in the reversal of the decision of the Commission (R. 5). Respondent moved for a new trial, which was denied, and judgment was entered for Petitioner (R. 5). Respondent then filed an appeal to the Court of Appeals of Maryland which, as stated, reversed without a new trial the findings of the jury and the judgment thereon of the Superior Court of Baltimore City, and held that the trial Court committed error in refusing Respondent's first or demurrer prayer (R. 146), which contained the request that the trial Court rule as a matter of law that deceased had been engaged in "interstate commerce" at the time of his death, and held, further, as a matter of law, that the remedy afforded by the Federal Employers' Liability Act was paramount and exclusive and that the Commission had no jurisdiction of the claim for compensation.

At the time of his death deceased was forty-five years of age, was a brakeman in the employ of Respondent (R. 6), and lived with his wife and infant children in Baltimore, Maryland. There were no eye witnesses to the accident causing the injuries to deceased that resulted in his death,

but it is clear from all the evidence adduced, and particularly from the nature and extent of his injuries as testified to by the Coroner (R. 71-74) and as they appear from the latter's inquest and verdict (R. 7-8), that deceased was run over or crushed (R. 73) by an engine in Respondent's Highland yards in Baltimore City, sometime shortly after 5:18 P. M. and before 6:30 P. M., on November 21, 1937, and died almost immediately thereafter. Because of the lack of eye witnesses the evidence bearing upon the cause and occurrence of the fatal accident was wholly circumstantial, and, for the added reasons that the events and deceased's activities and movements preceding the happening of the accident occurred while he was working with the crew of one of Respondent's freight trains, and that the accident occurred at an isolated point in Respondent's Highland yards, no testimony as to the preceding events or the accident itself, and no testimony of any of Respondent's activities or those of its instrumentalities involved, was available to Petitioner except that obtainable from deceased's fellow workmen and other employees of Respondent.

On the day of the accident deceased was working as a brakeman with a freight train crew consisting of a conductor (Hudson), engineman (Lambie), fireman (Morgan) and flagman (Arnold). All but the flagman, who appeared only at the Coroner's inquest, testified in the case, the conductor being called as a witness by Respondent, and the engineman and fireman testifying at the request of Petitioner. The evidence is conflicting as to whether these men, except for the trip of November 21, operated regularly as a crew, the conductor testifying (R. 29) that he had been with the crew for a month and that deceased had worked with him for that length of time, the engineman testifying (R. 58) that they had no regular crew, that sometimes deceased worked with him only at intervals of several weeks, and that they make up a train crew for each round trip out of Baltimore, and the fireman

testifying (R. 80) that he works "extra list" and that the trip in question was the only one he made with the so-called crew.

The entire group had, on November 20, the day before the accident, left Baltimore and gone to Enola, Pennsylvania, which is across the Susquehanna River and about five miles from Harrisburg, Pennsylvania (R. 10, 31, 32). At 3:30 A. M. on November 21 the group, which was resting in a bunk house at Enola (R. 32), was awakened and orally directed to go to Harrisburg (R. 10). The men procured, at Enola, engine No. 6733 and tender and a caboose in which they left Enola at 4:15 A. M. (R. 36, 37) and went to Harrisburg where the same engine, tender and caboose were coupled to a train of sixty-three cars of ore (R. 32) destined for the Canton ore piers in Baltimore, and consigned to the Bethlehem Steel Company at Sparrows Point, Maryland (R. 10, 34). This train was an "extra train" or an "extra made-up train", and, as distinguished from a "booked train", had no regular schedule and no fixed or regular times for beginning or terminating its run (R. 36), nor did the men in the group have any fixed or regular shift or time for working on the train (R. 31, 34).

In order to show the origin and destination of the ore cars, about which there is no dispute, Respondent offered in evidence a copy of the wheel report (Employer's Exhibit No. 1, R. 13-18), which shows that the train was an "extra"; twelve of the sixty-three waybills (Employer's Exhibit No. 2, R. 20-28), which establish that the ore cars were to be delivered by Respondent to the Canton ore piers and were consigned to the Bethlehem Steel Company at Sparrows Point, Maryland; photostatic copy of the remainder of the waybills, which Respondent, although requested to do so (R. 58, 97), failed to produce before the Commission and did not include in the record; the engineman's time sheet (Defendant's Exhibit C, R. 99-102); and the conductor's time sheet (Defendant's Exhibit D, R. 104-108). Petitioner requested Respondent at the hearing

before the Commission to produce the time cards (R. 79), which Respondent declined to do until the hearing in the Superior Court on appeal from the Commission, and which Respondent did not include in the record.

The train, with deceased acting as front brakeman, left Harrisburg at 7:20 A. M. on November 21 and, after dropping one ore car which had developed trouble (R. 34, 39, 59), passed, but did not stop at (R. 37, 41, 42), the first Baltimore station, Bay View yards, at 4:10 (R. 38, 60) or 4:20 P. M. (R. 10, 37) on the same day (R. 10). The first stop in Baltimore was at approximately 4:35 (R. 60) or 4:45 P. M. (R. 43) in Highland yards, which are stated to be about a half-mile (R. 10) to a mile (R. 42, 81) beyond Bay View yards; and the ultimate stop of deceased and his group in Baltimore, where, pursuant to specific orders, engine No. 6733 and its tender were uncoupled from the ore train (R. 10), was in Canton yards which are a half-mile (R. 10, 44) beyond Highland yards. The Canton ore piers, to which the ore train was hauled from Canton yards by a yard engine under the supervision of a yard crew (R. 11), are one mile (R. 10) beyond the Canton yards.

When the ore train made its first stop in Highland yards the conductor already had specific orders (R. 10, 33, 34, 41, 42, 45) which he had received in Harrisburg, and received further orders from the Highland yardmaster (R. 41, 52, 59, 78, 86, 88), that they were to haul the ore train on No. 1 track (R. 43, 61) only "to the head of the Canton yards to get our engine loose on account of it being too big to get down to the ore pier, and the yard engine handled the train from the yard at Canton to the ore pier" (R. 10, 41, 42, 43, 44, 69). The caboose was cut from the train in Highland yards and there placed upon a spur track, and the conductor and flagman remained there (R. 46) with the caboose while the engineman, fireman and deceased went on with the train to Canton yards (R. 45), the latter's duty being to uncouple the road engine and tender from the train at Canton yards (R. 10). Upon arriving at Can-

ton yards at about 5:15 P. M. (R. 43, 44) the road engine and tender were uncoupled from the ore train (R. 44, 69) which was taken completely in hand by the yard engine and crew and hauled the remaining distance to its destination at the Canton ore piers (R. 11, 44), while the road engine and tender were backed in reverse to Highland yards (R. 44, 45) after having been switched to No. 2 track. The road engine and tender started the backing movement from Canton yards on No. 2 track (R. 50, 53, 66), with the tender in the lead, at approximately 5:18 P. M. (R. 8, 45), although there is considerable conflict as to the exact amount of elapsed time, and prior to the start of the backing movement was the last time deceased was ever seen alive. He was known to have delivered the waybills for the ore cars to the yardmaster at Canton yards (R. 78, 79), and was seen to throw a switch in said yards, and then to climb upon the rear step of the tender and walk across the end sill to a ladder that leads from the back of the tender to the brakeman's cabin or "dog house" in the tender (R. 8, 65, 66, 80, 81). When the engine and tender reached Highland yards on the return trip they were recoupled to the caboose (R. 53, 66) and then, still in reverse, with the tender in the lead (R. 67), continued the return trip, after being switched on to the south track (R. 48, 66, 81), to the Bay View yards (R. 87).

There is conflicting testimony as to when deceased was first missed, the conductor first testifying that they missed him when the engine and tender backed into Highland yards from Canton yards (R. 47), and then stating (R. 49, 53) that they missed him when they reached Bay View yards, and finally denying (R. 55) that deceased had been missed before arriving back at Bay View yards. The first report that deceased was missing and inquiry as to his whereabouts (R. 67) were made after the engine, tender and caboose came into Bay View yards (R. 49) at about 6:10 P. M. (R. 54), at which time a mark and some hair and blood were found on the rear or end brake beam of

the tender (R. 53, 68, 84), after which the remaining members of the group accompanied by a yardmaster, in an effort to locate deceased, started to go back with the engine and tender over the route they had traversed from Canton yards (R. 49). Reaching Highland yards on this return trip they brought the engine to a stop and, while walking ahead, found the body of deceased between the rails of No. 2 track in said yards (R. 49, 50, 88) at a point estimated from one hundred and seventy feet (R. 56, 87) to two hundred and fifty feet (R. 56) south of the place where the caboose had been cut off and placed on the spur, and about seven or eight car lengths (R. 68) or four hundred feet (R. 83) from the Highland yardmaster's station. Deceased's cap and a cushion from the brakeman's cabin were found about forty-five feet south of his body (R. 72), and fuses and his gloves were found close by (R. 77).

After the body was found the yardmaster took charge of the situation and the engine and tender were returned to Bay View yards at 6:30 P. M. (R. 34, 37, 38, 54) where the caboose was, pursuant to previous orders, placed on the cabin track, and the engine and tender, likewise pursuant to orders, placed on the storage track (R. 82) at the ash pit in Orangeville (R. 11, 109), which is approximately one-quarter of a mile from Bay View yards (R. 54).

At the trial in the Superior Court Respondent's counsel read to the jury (R. 93-95) certain of Respondent's rules to show the general duties of its employees, and there is testimony as to said rules (R. 48, 88-90, 92-95, 143) brought out upon cross-examination of Respondent's employees in a fruitless effort of Petitioner to ascertain whether there was a written rule applicable to the duties of deceased at the time of his injuries. There also was testimony (R. 88, 89, 91, 92) from which it was attempted to be ascertained whether Respondent's crews leave their duties as a unit, and as to the duties of train and engine crews generally (R. 140-142), but such evidence as was adduced from all

of said testimony and rules is conflicting, and the entire question appears to have been governed by a labor agreement between Respondent and its employees. Respondent, in whose possession the labor agreement reposed, declined to produce said agreement or offer it in evidence (R. 91, 92, 141, 142).

B.

JURISDICTIONAL STATEMENT.

Petitioner seeks a review by certiorari, pursuant to Judicial Code, Section 237 (b), as amended by the Act of February 13, 1925 [43 Stat. 937; U. S. C. Tit. 28, Sec. 334 (b)], of a final judgment of the Court of Appeals of Maryland, the highest Court of said State, rendered and passed in this case on December 18, 1940. The case concerns the question of whether the remedy of Petitioner and her infant children for the recovery of compensation for the accidental death of her husband, the father of said infants, is pursuant to the Maryland Workmen's Compensation Act (Code of P. G. L. of Md., 1939, Article 101), under which Petitioner proceeded, or the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*), which was invoked by Respondent, The Pennsylvania Railroad Company, employer of deceased, in defense to the claim for compensation and in denial of State jurisdiction. The Federal questions sought to be reviewed were raised by Respondent before the State Industrial Accident Commission of Maryland, before which body Petitioner's claim for compensation initially was filed, by filing in writing (R. 4), preceding the taking of testimony, an issue as to whether deceased was engaged in interstate commerce when injured. From an adverse ruling by the Commission on that issue (R. 9), Petitioner filed an appeal to the Superior Court of Baltimore City, and an election for a jury trial, where the Federal questions again were raised by written issues (R. 3) filed before trial, and by prayers or requests for instructions at the conclusion of the evidence (R. 144-147). Exceptions to adverse rulings

on said prayers were duly noted by the parties (R. 144). The verdict and findings of the jury being favorable to Petitioner (R. 5), resulting in a judgment of reversal of the award of the Commission in favor of Respondent, an appeal was filed by Respondent to the Court of Appeals of Maryland where the Federal questions, duly presented and reserved in the record by bills of exceptions, were raised and argued in the briefs of the parties and orally before said Court. The Court of Appeals of Maryland, which decided the Federal questions adversely to Petitioner, sustained the rights, privileges and immunities specially set up and claimed by Respondent under the Federal Act.

For cases believed to sustain the jurisdiction of this Court, and to show that the questions here presented are Federal questions of substance, see, *e. g., Chicago, R. I. & P. Ry. Co. v. Devine,* 239 U. S. 52, 54; *Industrial Accident Comm. v. Davis,* 259 U. S. 182; *Toledo, St. Louis & West. R. R. Co. v. Slavin,* 236 U. S. 454; *Seaboard Air Line Ry. v. Padgett,* 236 U. S. 668; *Kinzell v. Chicago, M. & St. P. Ry. Co.,* 250 U. S. 130; *Southern Pac. Co. v. Industrial Acci. Comm.,* 251 U. S. 259.

C.

THE QUESTIONS PRESENTED.

(1) Were deceased and Respondent, at the time of the injuries resulting in his death, as a matter of law engaged in interstate transportation within the meaning of the Federal Employers' Liability Act?

(2) Was the question of whether deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act properly a question for the jury?

(3) Did Respondent meet and satisfy the burden of proof upon it to show that it and deceased, at the time of the injuries resulting in his death, were engaged in inter-

state transportation within the meaning of the Federal Employers' Liability Act so as to justify the Court below, upon the testimony and evidence in the record, in holding as a matter of law, as it did, that the remedy afforded by the Federal Act is paramount and exclusive in this case, and that the tribunals of the State are without jurisdiction to hear and determine Petitioner's claim for compensation for the death of deceased, her husband?

(4) Was the Court below justified in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury that deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation he previously had been engaged in, and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and that the trial Court erred in not instructing the jury as a matter of law that deceased was engaged in interstate "commerce" at the time of his death, where the evidence shows, as the jury found, that prior to receiving his injuries deceased and the instrumentalities of Respondent upon which he was in attendance had previously been completely and finally separated and withdrawn from interstate transportation?

(5) Was the Court below justified in reversing without a new trial the judgment of the trial Court and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, when the conclusions of the Court below were based on findings as to the nature of the removed shipment of ore rather than as to the nature of the activities of deceased and Respondent at the time of the injuries and with relation to the road engine and tender, and where the evidence shows that when deceased was injured both he and the engine and tender had previously been completely and finally removed, separated and withdrawn from said shipment of ore which, with the

waybills for it, had been taken in charge by another engine and crew?

(6) Was the Court below justified in reversing without a new trial the judgment of the trial Court and in holding, as a matter of law, that deceased when injured was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, when the conclusions of the Court below were based on the finding that deceased, when injured, was in an activity or service in itself only reasonably incident to interstate transportation or merely connected with another activity or service which, in turn, had previously been involved in forwarding an interstate shipment, and where the evidence shows, as the jury found, that when deceased was injured both he and the instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn from all interstate transportation?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Court of Appeals of Maryland has decided a Federal question of substance in a way not in accord with applicable decisions of this Honorable Court in several important and serious respects. In holding as a matter of law that a deceased employee of an intrastate and interstate carrier by railroad was, when injured, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and in reversing the judgment of the trial Court on the verdict and findings of a jury that said deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation in which he previously had been engaged, the Court below departed from and erroneously applied the fixed rule of this Court, evolved from the settled construction of said Federal Act, that in order for said Federal Act to be applicable, and State jurisdiction to be

displaced, the employing railroad must affirmatively show that at the time of the injuries both it and its employee were engaged in interstate transportation or in work so closely related to it as to be a part of it.

2. Under applicable decisions of this Court, involving the Federal Act, it has consistently been held that the activities of the parties at the time of the injury with relation to the particular instrumentalities then involved or in use by them are the determinative factors as to applicability of the Federal Act, yet the Court below, citing and relying upon tax cases not involving said Federal Act, selected as the determinative factor in this case the nature of a shipment of ore from which, as the evidence shows and as the jury in the trial Court found, deceased and Respondent's instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn. The undisputed evidence shows that the shipment of ore, together with the waybills therefor, had been, previous to the time of the injuries, delivered to and taken in charge by another engine and its crew.

3. Contrary to express holdings of this Court, and to the presumption against Federal and in favor of State jurisdiction in these cases, the Court below, in effect, proceeded and relied upon an assumption that unless the evidence affirmatively established that deceased was within the State Act the Federal Act applied, and held as a matter of law that, under the testimony and evidence in the record, the remedy under the Federal Act is paramount and exclusive in this case. In so doing the Court below missed or disregarded substantial evidence in the record that abundantly shows, as the jury actually found, that deceased when injured was engaged in intrastate work. The Court below failed to extend to Petitioner the rule of this Court that, in the circumstances present, she was entitled to the benefit of all evidence and inferences favorable to her; and, moreover, in holding that the issue of transportation was not a proper one for the jury, the Court

below departed from the general rule of this Court, invoked and applied by it in parallel cases and under similar circumstances, that such issue is, when facts or inferences are disputed or contradicted or uncertain, a question of fact, or a mixed question of law and fact, and thus rightfully for the jury to determine.

4. Without any sanction in the applicable decisions of this Court, as far as Petitioner has been able to ascertain, the Court below, in holding the State Act to be inapplicable, adopted and followed a theory that, if sound, which is denied most particularly by Petitioner, would result in practically every employee of an interstate carrier by railroad being embraced within the operation of the Federal Act and the termination of State jurisdiction altogether. The Court below said on this point: (R. 88) "Thus the service in which the brakeman *had been and was employed* at the time was primarily in forwarding of interstate commerce, and that the mode of this *connected service at the time of the accident was a reasonable incident or contingency* of the completeness of the service". That conclusion would seem to mean that when injuries occur to an employee while in an activity or service that is itself not in interstate transportation but only reasonably incident to it, or merely connected with another activity or service which, in turn, may have previously been involved in interstate transportation, the Federal Act applies. But such a theory utterly conflicts with the Federal Act and its construction by this Court which provide and hold that, for the Federal Act to apply, there must be shown to exist as regards the particular activity or service of the employee and the railroad a real, substantial, close or direct relation to or affect upon interstate transportation.

5. The Court below assumed, contrary to applicable decisions of this Court, as well as in disregard of the evidence and rational inferences of which it was susceptible, that because the instrumentalities upon which deceased

was in attendance when injured had previously been employed in interstate commerce they still retained interstate characteristics at the time of the injuries, although the undisputed evidence shows that said instrumentalities had been completely and finally separated and withdrawn from their previous service.

6. In total disregard of the most recent pronouncements of this Honorable Court drawing a clear distinction between the meaning of the words "commerce" and "transportation" in cases of this kind, the Court below held that the trial Court erred in refusing to grant Respondent's written demurrer prayer which was that the trial Court rule, as a matter of law, that deceased was engaged in interstate "commerce" at the time of his death. Respondent's said prayer was obviously predicated on the theory that if deceased, when he died, was in interstate "commerce", the State Courts are without jurisdiction to hear and determine the claim for compensation; whereas the correct rule of this Court is that for the Federal Act to apply there must be a showing that when injuries occur the employee is in interstate "transportation", or in work so closely related to it as to be practically a part of it, which has a narrower signification than "commerce". For that reason, also, the Court below was in error in holding that Respondent's said prayer should have been granted.

WHEREFORE, Your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of Maryland, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and of all proceedings in the case entitled and numbered on its docket, "The Pennsylvania Railroad Company, employer and self-insurer, v. Elva Mae Reeley, widow, and on behalf of the three infant children of the late George A. Reeley, deceased, No. 5, October Term, 1940," and that the said judgment of the Court of Appeals of

Maryland may be reversed by this Honorable Court, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and proper.

AND your Petitioner will ever pray, etc.

ISAAC LOBE STRAUS,
Counsel for Petitioner.

AVRUM K. RIFMAN,
Of Counsel.

Baltimore, Maryland,
February 10, 1941.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No.....

ELVA MAE REELEY, WIDOW, AND ON BEHALF OF THE THREE INFANT CHILDREN OF THE LATE GEORGE A. REELEY, DECEASED,

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS BELOW.

The opinion of the Court of Appeals of Maryland (R/49) is as yet unreported in the official State Reports. It was filed December 18, 1940, and may be found reported in full in 16 Atl. (2), 904. No written opinion was filed by Chief Judge Samuel K. Dennis, who presided at the trial of the case in the Superior Court of Baltimore City.

II.

JURISDICTION.

Jurisdiction is invoked pursuant to Judicial Code, Section 237 (b), as amended [43 Stat. 937; U. S. Tit. 28, Sec.

344 (b)], on the ground that rights, privileges and immunities under the Federal Employers' Liability Act of 1908 (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, *et seq.*) were specially set up and claimed by Respondent in and sustained by the Court of Appeals of Maryland, the highest Court of said State, by its final judgment rendered on December 18, 1940.

III.

STATEMENT OF THE CASE.

A full statement of the case has been given under heading A in the petition for certiorari, and for brevity the statement is not repeated here.

IV.

SPECIFICATION OF ERRORS.

(1) The Court of Appeals of Maryland erred in finding and holding as a matter of law that deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act.

(2) The Court below erred in finding and holding that the question of whether deceased and Respondent were, at the time of the injuries resulting in his death, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act was not properly a question for the jury.

(3) The Court below erred in not finding and holding that the burden of proof was upon Respondent affirmatively to show that it and deceased, at the time of the injuries resulting in his death, were engaged in interstate transportation within the meaning of the Federal Employers' Liability Act.

(4) The Court below erred in finding and holding as a matter of law, upon the testimony and evidence in the record, that the remedy afforded by the Federal Employers'

Liability Act is paramount and exclusive in this case, and that the tribunals of the State are without jurisdiction to hear and determine Petitioner's claim for compensation for the death of deceased, her husband.

(5) The Court below erred in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury that deceased, when injured, was engaged in intrastate work clearly separable and distinguishable from the interstate transportation in which he previously had been engaged, and in finding and holding as a matter of law that deceased, when injured, was engaged in interstate transportation within the meaning of the Federal Employers' Liability Act, and that the trial Court erred in not instructing the jury as a matter of law that deceased was engaged in interstate "commerce" at the time of his death, where the evidence shows, as the jury found, that prior to receiving his injuries deceased and the instrumentalities of Respondent upon which he was in attendance had been completely and finally separated and withdrawn from interstate transportation.

(6) The Court below erred in basing its conclusions that deceased and Respondent were, as a matter of law, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act on the nature of the removed shipment of ore rather than on the activities of deceased and Respondent at the time of the injuries and with relation to the road engine and tender, where the evidence shows that when deceased was injured both he and said engine and tender had previously been completely and finally removed, separated and withdrawn from said shipment of ore.

(7) The Court below erred in basing its conclusions that deceased and Respondent were, as a matter of law, engaged in interstate transportation within the meaning of the Federal Employers' Liability Act on the finding that de-

ceased, when injured, was in an activity or service in itself only reasonably incident to interstate transportation, or merely connected with another activity or service which, in turn, had previously been involved in forwarding an interstate shipment, where the evidence shows that when deceased was injured both he and the instrumentalities upon which he was in attendance had previously been completely and finally separated and withdrawn from interstate transportation.

(8) The Court below erred in finding and holding as a matter of law that the Federal Employers' Liability Act is applicable where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased when injured was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged, and the burden of proof was upon Respondent to establish jurisdiction under the Federal Act and to show that it did not exist under the State Workmen's Compensation Act.

(9) The Court below erred in reversing without a new trial the judgment of the trial Court on the verdict and findings of the jury where the evidence shows and the jury could have found, as it actually did find, that the engine and tender upon which deceased was in attendance when injured had previously been completely and finally separated and withdrawn from the shipment of ore, that they were not being used to transport anything, or to facilitate the movement of any commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation.

(10) The Court below erred in finding and holding as a matter of law that because the engine and tender, upon which deceased was in attendance when injured, had previously been engaged in an interstate haul they subse-

quently retained an interstate character and were thus still in interstate transportation within the meaning of the Federal Employers' Liability Act, where the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely and finally separated and withdrawn from all transportation and their character was wholly intrastate, and when the burden of proof was upon Respondent affirmatively to show the engine and tender, as well as deceased and Respondent in relation to them, to have been in interstate transportation within the meaning of the Federal Act when deceased was injured.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

1. Under the Federal Employers' Liability Act and its settled construction providing and holding that, for said Act to apply and State jurisdiction to be displaced, both the employer's and the employee's activities at the particular and precise time of injury must affirmatively be shown to have been in interstate transportation or in work so closely related to it as to be practically a part of it, the Court below was in serious error in basing its conclusions on the nature of the removed shipment of ore rather than on such activities, and in reversing the jury's findings, where the evidence shows that when deceased was injured both he and the engine and tender were completely removed from said shipment. The cases cited and relied upon by the Court below to support its finding of interstate transportation are tax cases, and do not involve the Federal Employers' Liability Act. Section 1 of the Federal Act and the many cases of this Court construing it clearly show that the nature of the removed, separated and withdrawn shipment of ore is immaterial to the determination of the status of deceased and Respondent at the time of the injuries. The true test, as provided in Section 1 of the Act and as repeatedly held by this Court, concerns only the activities of the parties at the time of injury to the employee.

2. The question of the status of deceased and Respondent at the time of his injuries depends for its answer entirely upon the facts in evidence and the controverted inferences deducible therefrom, and, as the burden was upon Respondent to establish jurisdiction under the Federal Act, and to show that it does not exist under the State Act, the Court below was in serious error in holding, as a matter of law, that the Federal Act applies where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased, at the time of his injuries, was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged. The inflexible rule, as applied by the Court below in other cases, is that the burden of proof was upon Respondent affirmatively to show that the parties were in interstate transportation within the Federal Act. The presumption is that State jurisdiction exists, and in Maryland that presumption is statutory. The Maryland statute, in addition, expressly contemplates and applies to persons in the status of deceased and Respondent. The Court below, in construing the Federal Act to be paramount and exclusive in this case, and in passing over the affect of the statutory presumption in Maryland, erroneously conceived the operation and effect of the Federal Act, so that even in respect to its construction of the Maryland statutes the decision of the Court below is not binding on this Court. In determining the legal sufficiency of the evidence as regards the question of whether the case was properly for the jury, Petitioner is entitled to the benefit of all favorable evidence and inferences, especially in view of the statutory presumption of State jurisdiction and the fact that the burden is upon Respondent to displace it. From the evidence before it the jury could have found, as it did find, that deceased when injured was engaged in intrastate work. Respondent withheld much relevant evidence, and that and the further fact that the evidence is conflicting, contradicted

and vigorously disputed in important and material respects make the question of transportation one for the jury. The jury properly passed on the credibility of the witnesses and the inferences from the facts before it, and had a clear right to believe or disbelieve such evidence as was presented to it.

3. The case was properly one for the jury on the question of deceased's status when injured, and, as the jury could have found that the engine and tender had previously been completely withdrawn from the ore shipment, that they were not being used to transport anything, or to facilitate the movement of commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation, the verdict of the jury was fully justified and the Court below was in serious error in reversing the judgment based on it. In view of the conflict in the evidence, the controverted and diverse inferences to be drawn from it, and the fact that credibility of witnesses is involved, the case is peculiarly one for the jury on the question of transportation. The Court below, in stating that the material facts are in agreement, is in error because said Court misconceives the material facts in that it holds the nature of the removed shipment of ore, rather than the activities of deceased, to be determinative and the tax cases to be controlling. However, even where material facts are in agreement a question is properly for the jury where conclusions or inferences are uncertain, and that rule has been invoked and applied by this Court in cases involving the Federal Employers' Liability Act. This Court consistently has held the question of transportation in similar cases, involving said Federal Act, to be for the jury to determine.

4. The reasoning of the Court below in holding that Federal and not State jurisdiction is appropriate is in conflict with the Federal Act and this Court's construction of it, and, if carried to its logical conclusion, would result in

including within the purview of the Federal Act every person in the employ, and every instrumentality in the service, of interstate carriers by railroad. The Court below held deceased to have been in interstate transportation on the theory that when injured he was in a connected service which was a "reasonable incident or contingency" to and of his previous service which, in turn, had been involved in the forwarding of the removed and withdrawn shipment of ore. Such a theory is in direct conflict with the Federal Act and the holdings of this Court construing it, which clearly show that for the Federal Act to apply an employee when injured must, with his employer, be in a service that has a real, substantial, close or direct relation to or affect upon interstate transportation. The question here is not the power of Congress to extend the operation of the Federal Act but only of the meaning of the Act Congress chose to enact. The fallacy of the theory applied by the Court below lies partly in the fact that it relies on the nature of the removed shipment of ore as the determinative factor of the question of transportation, and disregards the fact that the engine and tender, together with deceased and his fellow workers, were withdrawn from said shipment when the injuries occurred. Deceased's accident, or anything else that could have happened to him or the road engine and tender, did not and could not affect the shipment of ore or interstate transportation generally. This Court has, in cases involving the Federal Act, expressly rejected the theory of the Court below and pointed out that to adopt it would conflict with the Federal Act and bring within its purview all employees and instrumentalities of interstate carriers by railroad.

5. As the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely withdrawn from all transportation and their character was wholly intrastate, the Court below was in serious error in holding, as a matter of law, that because the engine and tender had previously been engaged in an interstate haul

they subsequently retained an interstate character and were thus still in interstate transportation, where the burden was upon Respondent affirmatively to show the engine and tender to have been in interstate transportation when deceased was injured. There could be no connected service, within the theory of the Court below, as regards the engine and tender because it is undisputed that when the injuries occurred they were completely withdrawn from the shipment of ore which was in charge of another engine and crew. As the rule of the Act and this Court requires the employer as well as the employee at the time of injury to be in interstate transportation as respects the instrumentalities involved, it is plain that, the engine and tender having previously been separated from the shipment of ore, Respondent was not in interstate transportation as far as were concerned said engine and tender, and the Federal Act does not apply. Respondent did not meet the burden upon it to show interstate characteristics in the engine and tender. The Court below assumed that they retained an interstate character, although separated from the shipment of ore, and, in effect, substituted that assumption for the proof required of Respondent. That assumption is at war with holdings of this Court that an engine, as such, is not permanently devoted to any kind of traffic. Deceased, Respondent, and its instrumentalities were not, at the time of the injuries, in interstate transportation as this Court has construed those terms and the meaning of the word commerce in the Federal Act. The test of Federal jurisdiction is not whether deceased when injured was in interstate "commerce", as found by the State Industrial Accident Commission and as the trial Court was requested by Respondent to instruct the jury, but whether deceased and Respondent were, when the injuries occurred, in interstate "transportation" or in work so closely related to it as to be practically a part of it. Under the holdings of this Court, and the true test of jurisdiction under the Federal Act, the State Act clearly was applicable.

1.

Under the Federal Act and its settled construction providing and holding that, for the Act to apply and State jurisdiction to be displaced, both the employer's and the employee's activities at the particular and precise time of injury must affirmatively be shown to have been in interstate transportation or in work so closely related to it as to be a part of it, the Court below was in serious error in basing its conclusions on the nature of the removed shipment of ore rather than on such activities, and in reversing the jury's findings, where the evidence shows that when deceased was injured both he and the engine and tender were completely removed from said shipment.

It is respectfully and earnestly submitted that the Court below misapplied the settled rule pronounced by this Court in construing Section 1 of the Federal Employers' Liability Act, namely, that the activities of the parties at the time of and with relation to the happening of the accident govern the status of an injured employee, and that this misapplication of the rule resulted because the Court below employed, as the determinative element of deceased's status, not his and Respondent's *activities at the time of the accident* in relation to the instrumentalities causing his death and upon which he was then in attendance, but the *then character and nature of the shipment of ore*, from which, as the undisputed evidence shows, the deceased and the engine and tender had *previously* been completely and finally separated and withdrawn. It would seem obvious, from the first authorities cited and relied upon in the discussion of the law by the Court below, that *the nature of the removed and separated shipment of ore* rather than *the activities of the parties at the time of the injury* controlled its decision, particularly because those authorities do not deal with situations involving the Federal Employers' Liability Act but are tax cases involving *the nature of goods being transported*, the holdings in those cases being that the taxes objected to were imposed by states for carry-

ing on interstate commerce and thus void. The language in this respect of the Court below, in its said discussion of the law, is: (R. 179):

> "The temporary stoppage of the interstate shipment of the ore in order to change engines was simply a handling or operation while in transit and in the ordinary course of such an interstate movement, *and was not an alteration of the nature of the shipment. Western Oil Refining Co. v. Lipscomb*, 244 U. S. 346, 349; *Carson Petroleum Co. v. Vial*, 279 U. S. 95, 103."

Again, in discussing the facts, the Court below placed great emphasis on the *position and nature of the ore shipment*, although when the injuries occurred its waybills had been delivered up by deceased and the road engine with deceased in attendance had left it and was headed for the ash pit. The Court below, in this regard, said (R. 178):

> "* * * The fallacy of this reasoning (of the trial Court) lies in the exclusion of *important and determinative factors* whose existence is factually undisputed.
>
> "*The shipment of the ore was not complete until its return at the piers at the Canton terminal.* It was an element in this carriage and delivery by railway from Harrisburg to the waterside in Baltimore that the traction of the train of loaded freight cars through Pennsylvania and Maryland would not be completed by its freight engine on account of its large size, which would prevent it from going to the piers; and that, after pulling the train to the Canton yards, the freight engine and tender would necessarily leave the line of freight cars in the Canton yards *which, however, was not the end of the interstate shipment.* * * *."

Petitioner has never contended that the nature of the shipment was or became intrastate, but maintained and now maintains that, after the ore train was taken in charge by the yard crew and its engine, the waybills for the ore shipment delivered to the Canton yardmaster, and deceased

began his return trip in the opposite direction to Highland yards, the nature of the removed shipment became totally immaterial to determine his status and the inapplicability of the Federal Act. Moreover, it is submitted that the only pertinent inquiry was as to his activities and those of Respondent at the time of the injuries with relation to the particular instrumentalities upon which he was then in attendance, and not as to what he or Respondent had previously done or subsequently would do, or what Respondent through other employees was then doing, with relation to the shipment of ore with which deceased, the crew, and the instrumentalities upon which they were engaged, had severed all connection.

The language of Section 1 of the Federal Employers' Liability Act is itself perfectly clear as to what an employee must establish by substantial evidence in an action under said Act to bring himself within its provisions. That Section provides, *inter alia*, that: "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury *while he is employed by such carrier in such commerce*", and, in construing said Section of the Act, this Court, speaking through Mr. Justice Van Devanter in the *Second Employers' Liability Cases*, 223 U. S. 1, said (pp. 48-49, 51-52):

> "* * * Congress, in the exertion of its power over interstate commerce, may regulate the relation of common carriers by railroad and their employees, *while both are engaged in such commerce*, subject always * * * to the qualification that the particulars in which those relations are regulated must have *a real or substantial connection with the interstate commerce in which the carriers and their employes are engaged.* "The present act * * * deals only with the liability of a carrier engaged in interstate commerce for injuries sustained by its employes *while engaged in such commerce.*"

In *Chicago, B. & Q. R. R. Co., v. Harrington*, 241 U. S. 177, the employee was a member of a switching crew which, at the time of the injury resulting in his death, was transferring, with the aid of a locomotive that concededly was at times employed in interstate transportation, coal to bins or chutes from where it was supplied to other interstate locomotives. The employee's body was found beside the tracks after a collision between the coal train on which he was riding and a car of sand. In affirming an award made under a state law to his widow, and in holding that the deceased was not engaged in interstate transportation within the meaning of the Federal Act, this Court, speaking through Mr. Justice Hughes, said (pp. 179-180):

> "As the question is with respect to the employment of the decedent at the time of the injury (*Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473. 478), *it is not important whether he had previously been engaged in interstate commerce, or that it was contemplated that he would be so engaged after his immediate duty had been performed.* * * *
>
> "As we have pointed out, the Federal Act speaks of interstate commerce in a practical sense suited to the occasion and 'the true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it'. *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, 558, and cases there cited."

In *Illinois Central R. R. Co. v. Behrens*, 233 U. S. 473, the employee was, unlike deceased here, a member of a crew regularly engaged in interstate transportation, but at the time of a collision causing his death the crew was moving intrastate freight. The evidence showed that upon completing that movement the crew was to have gathered up and taken to other points several other cars as a step or link in their interstate transportation. In answer to a question certified to it by a Circuit Court of

Appeals, this Court, through Mr. Justice Van Devanter, held that, as a matter of law, the deceased employee at the time of his injuries was engaged in intrastate work, and, construing Section 1 of the Federal act, said:

> "Giving to the words 'suffering injury while he is employed by such carrier in such commerce' their natural meaning, as we think must be done, it is clear that Congress intended to confine its action to injuries occurring when the *particular service in which the employee is engaged is a part of interstate commerce.* The act was so construed in *Pederson v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146. It was there said: 'There can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employee is employed by the carrier in such commerce. * * * The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? *Mondou v. New York, New Haven & Hartford Railroad Co.*, 223 U. S. 1; *St. Louis, S. F. & T. Ry. Co. v. Seale*, 229 U. S. 156, 158; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 256."

In *Erie Railroad Co. v. Welsh*, 242 U. S. 303, in which recovery was sought under a state law, the employee, a yard conductor, was injured when he stepped from a moving locomotive which, under his supervision and pursuant to orders of the yardmaster, was being returned from shifting cars, including one loaded with interstate freight, for the purpose of obtaining further orders. In affirming the holding of the State Court that, as a matter of law, the employee was at the time of his injury engaged in intrastate work, this Court, through Mr. Justice Pitney, said (p. 306):

> "It is in evidence, also, that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of that it is argued that his act at the moment of his injury partook of the nature of the

work that, but for the accidental interruption, he would have been called upon to perform. *In our opinion this view is untenable. By the terms of the Employers' Liability Act the true test is the nature of the work being done at the time of the injury,* and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the Act."

In *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, this Court, speaking through Mr. Justice Van Devanter, said (pp. 557-558):

"* * * And so it results where the carrier is also engaged in intrastate commerce *or what is not commerce at all,* that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employees, must look for redress to the laws of the State wherein the injury occurrs. * * *

"The question for decision is, was Shanks at the time of the injury employed in interstate commerce within the meaning of the Employers' Liability Act? *What his employment was on other occasions is immaterial* for, as before indicated, the act refers to *the service being rendered when the injury was suffered.*

"* * * We think it (the Act) speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S. 375, 398), and that the true test of employment in such commerce in the sense intended is, *was the employee at the time of the injury* engaged in interstate transportation or in work so closely related to it as to be practically a part of it."

See also:

Illinois Cent. R. R. Co. v. Peery, 242 U. S. 292, 293;

New York, N. H. & H. R. Co. v. Bezue, 284 U. S. 415;

Chicago & N. W. Ry. Co. v. Bolle, 284 U. S. 74;

North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 256;

Minneapolis & St. Louis R. R. Co. v. Winters, 242 U. S. 353, 356;
Pederson v. Delaware, Lack. & West. R. R. Co., 229 U. S. 146, 150;
Chicago & E. I. R. Co. v. Industrial Commission, 284 U. S. 296;
Industrial Commission v. Davis, 259 U. S. 182;
Southern Pac. Co. v. Industrial Acci. Comm., 251 U. S. 259, 263;
New York Cent. R. R. Co. v. White, 243 U. S. 188, 192;
Raymond v. Chicago, M. & St. P. Ry. Co., 243 U. S. 43.

2.

The question of the status of deceased and Respondent at the time of his injuries depends for its answer entirely upon the facts in evidence and the controverted inferences deducible therefrom, and, as the burden was upon Respondent to establish jurisdiction under the Federal Act, and to show that it does not exist under the State Act, the Court below was in serious error in holding, as a matter of law, that the Federal Act applies where the evidence and the inferences to be drawn therefrom are abundantly sufficient, if not conclusive, to show, as the jury actually found, that deceased, at the time of his injuries, was engaged in intrastate work clearly separable and distinguishable from any interstate transportation in which he had previously been engaged.

The Court below is altogether silent upon the vital and salutary rule that a railroad company which attempts to free itself from the obligation to pay and provide compensation under a workmen's compensation act must assume the burden of proving that both it and its employee were actually engaged in interstate transportation within the Federal Act at the time of injury. *Konsoute v. Pennsylvania Railroad Co.*, 287 Pa. 302, 135 A. 209, cert. den. 273 U. S. 747; *Russell v. St. Louis, S. F. Ry Co.*, 336 Mo. 845, 81 S. W. (2) 621; *Balto. & Ohio C. T. R. Co. v. Indus-*

trial Commission, 336 Ill. 223, 8 N. E. (2) 642; *Mitchell v. Louisville & N. R. Co.,* 305 Ill. A. 635, 27 N. E. (2) 861; *McCoy v. Southern Pac. Co.,* 29 Cal. A. 16, 83 P. (2) 970; cert. den. 307 U. S. 626; *Reif v. Schumacker, et al.,* (Cal. 1940), 102 P. (2) 375; *Colangelo v. Pittsburgh & L. E. R. Co.,* 336 Pa. 490, 9 A. (2) 391; *Gidley v. Chicago Short Line Ry. Co.,* 346 Ill. 122, 178 N. E. 399, cert. den. 285 U. S. 554. The Court below has itself invoked and applied that settled rule in other cases (see: *Pennsylvania Railroad Co. v. Stallings,* 165 Md. 615, 618, 170 A. 163, and cases cited).

The presumption in these kinds of cases is, of course, that the employer, while in the use and operation of its railway, is engaged in intrastate work, and in Maryland the presumption is statutory in cases under its Workmen's Compensation Act as to the applicability of said Act to injured employees, and is made express and explicit by Section 79 of Article 101 (Code of Md., 1939) which provides:

> "In any proceeding for the enforcement of a claim for compensation under this Article, it shall be presumed in the absence of substantial evidence to the contrary:
>
> (a) That the claim comes within the provisions of this Article. * * *."

That this statutory presumption contemplates and applies to employers and employees in the status of Respondent and deceased in the instant case is plain from the provisions of Section 44 of said Article 101, which provides (paragraph 3):

> "The provisions of this Article shall apply to employers and employes engaged in intrastate and also in interstate and foreign commerce for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, * * *."

It is, of course, conceded that the construction by the Court of Appeals of Maryland of the provisions of the State Act is to be respected whenever the application of said Act within the sphere of purely State activities is drawn in question, but it is the rule of this Court that a construction of a state statute by the state courts resulting from their erroneous conception of Federal statutes is not binding on the Federal courts (*Tipton v. Atchison, T. & S. F. Ry. Co.*, 298 U. S. 141, 151; *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 120). In this connection it is submitted that although the Court below, in its own view of the facts, concluded that: "The remedy afforded by the Federal Employers' Liability Act is paramount and exclusive", nevertheless the construction and application by the Court below of both Acts were erroneous, and that it is necessary, under the present circumstances, that this Court analyze the evidence to the extent required to give to Petitioner the benefit of her claim that she has been denied relief by virtue of alleged rights asserted by Respondent under the Federal Act and based upon conclusions of fact that are without adequate or any support in the record (*Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 611; *North Carolina R. R. Co. v. Zachery*, 232 U. S. 248, 258-259).

It is respectfully maintained, moreover, that, in passing upon the proposition as to whether the Court below erred in holding that Respondent's prayer for a directed verdict should have been granted at the close of the evidence, Petitioner is entitled to all the evidence favorable to her and all favorable inferences reasonably and naturally to be drawn from the evidence (*Gunning v. Cooley*, 281 U. S. 90; *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 606; *Phillips v. Union Terminal Ry. Co.*, 328 Mo. 240, 40 S. W. (2) 1046, cert. den. 284 U. S. 660; *Voelker v. Delaware, L. & West. R. Co.*, 31 F. Supp. 387 (D. C., N. Y.). The fact that the burden was upon Respondent to establish its affirmative defense under the Federal Act to the claim for compensation gives additional emphasis to the favored position in which Petitioner is to be regarded as respects

the evidence and the inferences therefrom (*cf. Osborne v. Gray*, 241 U. S. 16). The jury was entitled to expect, and the Court below ought to have held it to be a requirement, that Respondent meet its burden of proof by showing, from evidence that only Respondent could produce, all relevant matter pertaining to the issues in the case; and in the absence of such showing the jury was entitled to pass upon the credibility of the witnesses and of all the evidence before it, to believe or disbelieve them, and to draw its own inferences from the facts and base its findings thereon (*Western & Atlantic R. R. v. Hughes*, 278 U. S. 496, 498).

From the evidence before it the jury could have found that, at the time of his injuries, deceased was employed and engaged in the wholly intrastate activity of brakeman upon an engine and tender completely withdrawn from all transportation and passing between two intrastate points, both within the confines of Baltimore City, namely, Canton yards and the ash pit at Orangeville adjacent to Bay View yards. There is a conflict in the evidence as to deceased's usual duties, and as to whether he was a regular member of an interstate crew, but, insofar as such facts may have shed light on deceased's status at the time of his injuries, the jury could have found that deceased's regular employment was always in intrastate service, and that at the time of his death, preceding the injuries resulting therein, he had been given a *special assignment* on an "extra made-up train". With further regard to the duties of deceased, and in the absence of any showing by Respondent on the subject and of the production of the labor agreement which Respondent declined to produce, the jury could have found that, at the time of his injuries, deceased was in possession of definite orders to engage in or return to some totally intrastate duty immediately upon the conclusion of the work he was then doing, and that the crew with which he was working was not operating as a unit on said work but that each member had separate orders. The jury could have found that the

engine and tender upon which deceased was in attendance were, except for their use preceding the injuries, instrumentalities employed solely in intrastate work, and that only on said trip were they used interstate because of some necessity requiring the extra made-up character of the train. It could have found, further, that, upon reaching the ash pit at Orangeville, the engine and tender were to be completely withdrawn from all commerce and placed in the roundhouse there for cleaning or overhauling. From the verdict returned by the jury, and its answers to the issues submitted to it, it would seem obvious that the jury did find in general accord with what, as above outlined, it could reasonably and rationally have found and inferred from the evidence before it.

The attention of this Court is respectfully directed to the circumstance that Respondent, although in exclusive possession of full knowledge of all information bearing on the many factors that may have aided in guiding the jury toward findings favorable to it, failed or declined to offer in evidence much that may have been helpful. That circumstance, in itself, in addition to affording the jury the right to draw inferences from the lack of evidence, was sufficient to implant in the minds of the jurors the suspicion that the credibility of Respondent's evidence was questionable, and, in the exercise of its proper function, the jury had the right to believe or disbelieve such evidence as was presented to it (*Wichita Falls & Southern R. R. Co. v. Holbrook*, 125 Tex. 184, 78 S. W. (2) 938, cert. den. 296 U. S. 618).

Respondent could have shown, but did not show, as bearing on the question of deceased's status at the time of his injuries, the regular duties of deceased, whether he customarily was employed in intrastate or interstate activities, whether he was a regular member of the crew with which he was associated, or what duties, if any, he was to have undertaken following those he was at the time of his injuries engaged in. A vigorous cross-examination of Re-

spondent's employees by counsel for Petitioner failed to throw any adequate light on that question and clearly left its determination a jury matter. Respondent could have produced, but did not produce, the labor agreement mentioned in the evidence which contained provisions governing the duties and activities of its employees. It could have shown, but did not show, what facts surrounded the special assignment of deceased on the extra or extra made-up train, and the nature of such special assignment and extra train. Respondent could have shown, but did not show, what orders, if any, were in hand for the engine and tender upon reaching the ash pit, whether they were to be cleaned, overhauled or repaired there or returned to commerce. In the absence of any showing by Respondent on those subjects the jury had the clear right to, and obviously did, draw its own inferences from the facts as it found them to be.

3.

The case was properly one for the jury on the question of deceased's status when injured, and, as the jury could have found that the engine and tender had previously been completely withdrawn from the ore shipment, that they were not being used to transport anything, or to facilitate the movement of commerce, but were passing between intrastate points en route to a storage track and ash pit, and that neither deceased nor the engine and tender were to be employed thereafter in any transportation, the verdict of the jury was fully justified and the Court below was in serious error in reversing the judgment based on it.

It is submitted to be clear that, as the testimony on the part of Respondent was conflicting in important and material aspects, and, as the record shows, vigorously disputed by Petitioner's counsel in the course of cross-examination, and particularly in view of the controverted and diverse inferences that could rationally be drawn from said testimony and its nature, the case was peculiarly one for determination by a jury, and the action of the trial Court

in permitting the jury to pass upon the matters at issue was correct and in accordance with the holdings of this Court. As was said by this Court, through Mr. Justice Butler, in *Gunning v. Cooley*, 281 U. S. 90, at p. 94:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a peremptory instruction, the court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them. *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 606. *Gardner v. Michigan Central Railroad*, 150 U. S. 349, 360. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 524, 527. * * *."

Although the Court below states in its opinion that the evidence is in agreement on the material facts, it is contended by Petitioner, as hereinbefore argued, that the Court below is in error as to what are the material facts, and that the record plainly shows that important and material testimony of Respondent is, in addition to being disputed, contradictory and contradicted by Respondent's own employees. In that relation, however, it is a well-founded rule of this Court that where there is uncertainty as to the existence of a fact the question is not one of law but of fact, and this, as per Mr. Justice Brewer in *Richmond & Danville R. R. Co. v. Powers*, 145 U. S. 43, at p. 45,

> "Whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them. *Railroad Co. v. Stout*, 17 Wall. 657; *Washington & Georgetown Railroad v. McDade*, 135 U. S. 554; *Delaware & Lack. Railroad v. Converse*, 139 U. S. 469."

In cases such as that at bar where, despite the existence of conflicting or disputed evidence or inferences, it may clearly be found or inferred from the evidence that the em-

ployee was, when injured, engaged in intrastate transportation or work, this Court has not hesitated to so hold as a matter of law (*cf. Illinois Cent. R. R. Co. v. Behrens*, 233 U. S. 473; *Illinois Cent. R. R. Co. v. Peery*, 242 U. S. 292; *Erie Railroad Co. v. Welsh*, 242 U. S. 303; *Lehigh Valley Railroad Co. v. Barlow*, 244 U. S. 183); and in other cases where there are disputed matters of fact or inferences therefrom, or undisputed or uncontradicted facts susceptible of diverse and conflicting inferences, or uncertainty as to the existence of a fact, involving the question whether an employee was injured while in interstate transportation within the meaning of the Federal Act, this Court has consistently ruled that the issue of interstate transportation is properly determinable by a jury.

In *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, the employee, a fireman of a locomotive about to begin an intrastate trip, was killed when struck by another locomotive. Some of the cars of the train to be hauled by deceased's locomotive contained interstate freight. In holding that the question of deceased's status should have been submitted to the jury, this Court, speaking through Mr. Justice Pitney, said (pp. 258, 261):

> "* * * Of course, if upon the evidence any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. * * *
>
> "We conclude that with respect to the facts necessary to bring the case within the Federal Act, there was evidence that at least was sufficient to go to the jury. *It is doubtful whether there was substantial contradiction respecting any of these facts; but this we need not consider.*"

In *Southern Railway Co. v. Lloyd*, 239 U. S. 496, in holding the question of the employee's status to be for the jury, this Court, through Mr. Justice Day, said (p. 501):

"* * * It is insisted that the trial Court should have given the instruction requested by the railroad company to the effect that upon the facts shown the plaintiff was not engaged in interstate commerce at the time of his injury. Upon this subject there is testimony in the record to support the allegations of plaintiff's petition and the charge to the jury as given. The trial court charged that in order to recover, the burden was upon the plaintiff to show that at the time he received his injury he was engaged in interstate commerce. *In refusing the request asked, and leaving the issue to the jury, the trial Court committed no error and the Supreme Court of the state rightly affirmed the judgment in that respect. North Carolina R. R. Co. v. Zachary*, 232 U. S. 248; *Pedersen v. Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146; *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260; *Pennsylvania R. Co. v. Donat*, 239 U. S. 50."

In *Louisville & Nashville R. R. Co. v. Parker*, 242 U. S. 13, this Court, in holding the question of commerce to be for the jury, said, through Mr. Justice Holmes (p. 15):

"* * * The railroad company did not ask to go to the jury on the question whether the deceased was engaged in interstate commerce. It simply asked the court to direct a verdict on the ground, among others, that it appeared as matter of law that he was so engaged. *But if the question had been left to the jury and they had disbelieved the testimony that the empty car was moved for the ulterior purpose of interstate commerce there would have been no error of law in allowing a verdict for the plaintiff to stand.* * * *."

In *New York Cent. R. Co. v. Marcone*, 281 U. S. 345, this Court, speaking through Mr. Justice Stone, said (p. 350):

"The engine, No. 3835, on which deceased last worked was used in hauling interstate trains. * * * But Petitioner contends that deceased, having finished his work, was no longer employed in interstate commerce. The trial court submitted to the jury the question

whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it."

See also, for authorities supporting Petitioner's position on this point: *Illinois Cent. R. R. Co. v. Peery*, 242 U. S. 292; *Balto. & Ohio S. W. R. Co. v. Burtch*, 263 U. S. 540, 545; *Pedersen v. Delaware, Lack. & West. R. R. Co.*, 229 U. S. 146, 153; *Pennsylvania Co. v. Donat*, 239 U. S. 50; *Seaboard Air Line Ry. v. Koennecke*, 239 U. S. 352; *Palermo v. Erie R. Co.*, 173 N. Y. Supp. 456, 185 App. Div. 656; *Seyle v. Charleston Terminal Co.*, 106 S. Car. 215, 90 S. E. 1016, 109 S. Car. 99, 95 S. E. 178; *Mellon v. Weber*, 115 Oh. St. 91, 152 N. E. 753; *Howard v. Mobile & O. R. Co.*, 335 Mo. 295, 73 S. W. (2) 272; *Berry v. St. Louis & S. F. Ry. Co.*, 324 Mo. 775, 26 S. W. (2) 988, cert. den. 281 U. S. 765; *La Lone v. St. Louis M. B. T. Ry. Co.*, 316 Mo. 835, 293 S. W. 379, cert. den. 275 U. S. 524; *Smith v. Salt Lake & U. R. R. Corp.*, (Utah, 1940), 105 P. (2) 338; *St. Louis & S. F. Ry. Co. v. Fraser*, 75 Okla. 265, 183 P. 478; *Roberson v. St. Louis M. B. T. Ry. Co.*, 201 Mo. App. 672, 213 S. W. 873; *Philadelphia & R. Ry. Co. v. Berman*, 295 F. 658 (C. C. A. 3); *Flack v. Delaware, L. & W. R. Co.*, 45 F. (2) 683 (C. C. A. 2).

4.

The reasoning of the Court below in holding that Federal and not State jurisdiction is appropriate is in conflict with the Federal Act and this Court's construction of it, and, if carried to its logical conclusion, would result in including within the purview of the Federal Act every person in the employ, and every instrumentality in the service, of interstate carriers by railroad.

It would seem from the opinion of the Court below that the *rationale* of its decision is that the service in which deceased had previously been engaged was that of forwarding an interstate shipment which was still in interstate transportation at the time of the injuries, that the service in which he was engaged when injured was a *con-*

nected service with his previous service in interstate transportation, and that, as the mode of this *connected service* was a *reasonable incident or contingency* of the complete service in interstate transportation, Respondent and deceased both were, therefore, at the time of his injuries, engaged in interstate transportation. In thus reaching its conclusion that both Respondent and deceased were engaged in interstate transportation at the appropriate time, the Court below said (R. 179-180):

> "The withdrawal of the freight engine and tender from the head of the Canton yards and the taking of the cabin car from where it had been left on the spur track, which was open at both ends, were operative necessities which were *incident to the interstate transportation of the ore* * * *. Thus the service in which the brakeman *had been and was employed* at the time was primarily in forwarding of interstate commerce, and that the mode of this *connected service* at the time of the accident was a *reasonable incident or contingency* of the completeness of the service."

Petitioner emphatically disputes that the evidence in the case and the rational inferences therefrom are susceptible of establishing only the particular conclusions reached by the Court below in the factual respects stated in its opinion, and maintains, moreover, that it is not sufficient, for a case to be shown to be within the Federal Act, that injuries occur when the employee is in an activity or service that is itself not in interstate transportation but only *reasonably incident* to interstate transportation or merely *connected* with another activity or service which, in turn, may have previously been involved in forwarding an interstate shipment. The fallacy, it is submitted, of the Court's reasoning in this respect lies in the fact that it considers as the determinative factor the *nature of the shipment of ore* and the activity or relation of Respondent with regard to *it*, and not the activity of deceased, when injured, which was totally unconnected with said shipment,

and the activity or relation of Respondent *with regard to the engine and tender;* and also in the fact that the Court below concluded that, as the said shipment of ore was still in interstate commerce, an activity or service that was merely "a reasonable incident or contingency" of the complete service required to maintain the interstate character of the shipment of ore was likewise in interstate transportation within the meaning of the Federal Act.

A complete answer to that position of the Court below is contained in Section 1 of the Federal Act itself and in this Court's construction thereof in the *Second Employers' Liability Cases,* 223 U. S. 1, where, through Mr. Justice Van Devanter, it is said (pp. 51-52) that Congress could regulate the relation of common carriers by railroad and their employees, while both were engaged in interstate commerce,

> "Subject always * * * to the qualification that the particulars in which those relations are regulated *must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.*"

This Court has never departed from the rule that, in order for an employee to come within the provisions of the Federal Act, it must be affirmatively established that at the time of injury he and his employer must both have been actually engaged in interstate transportation or in work so *closely* related to it as to be *practically a part of it.* The lower courts, as well, have followed and adhered to that rule and, in cases parallel to that at bar, have stressed the required showing of a close relation to interstate transportation. See, in this connection: *Grigsby v. Southern Ry. Co.,* 3 F. (2) 988 (C. C. A. 6), cert. den. 268 U. S. 704 *Schauffele v. Director General,* 276 F. 115 (C. C. A. 3), cert. den. 257 U. S. 661; *Wise v. Lehigh Valley R. Co.,* 43 F. (2) 692 (C. C. A. 2); *Southern Pac.*

Co. v. Middleton, 54 F. (2) 883 (C. C. A. 5); *Middleton v. Southern Pac. Co.*, 61 F. (2) 929 (C. C. A. 5), cert. den. 289 U. S. 736; *Siegel v. Missouri-K.-T. R. Co.*, 342 Mo. 130, 119 S. W. (2) 376, cert. den. 305 U. S. 654; *Missouri Pac. R. Co. v. Industrial Commission*, 348 Ill. 355, 180 N. E. 912; *Spencer v. Chicago & N. W. Ry. Co.*, 336 Ill. 560, 168 N. E. 686, cert. den. 281 U. S. 736; *Cox v. Missouri Pac. R. Co.*, 332 Mo. 991, 61 S. W. (2) 962; *Mease v. Reading Co.*, 126 Pa. Super. 436, 191 A. 402, cert. den. 302 U. S. 705; *Van Brimmer v. Texas & P. Ry. Co.*, 190 F. 394 (D. C. Tex.); *Murray v. Pittsburgh C., C. & St. L. R. Co.*, 263 Pa. 398, 107 Atl. 21; *Rice v. Baltimore & O. R. Co.*, 42 F. (2) 387 (C. C. A. 6); *Pope v. Utah-Idaho Cent. R. Co.*, 54 F. (2) 575 (C. C. A. 10).

As further indicative of Congressional intent as regards the required close and substantial relationship to interstate transportation is the amendment of August 11, 1939 (53 Stat. 1404) to the Federal Act. This amendment, which was adopted subsequent to the injuries to deceased and is thus inapplicable to the instant case (see *Painter v. Balto. & O. R. Co.*, (Pa., 1940), 13 A. (2) 396, cert. den. Oct. Term, 1940; *Wichita Falls & S. R. Co. v. Lindley*, (Tex., 1940), 143 S. W. (2) 428; *Winfree v. Northern Pac. Ry. Co.*, 227 U. S. 296), obviously was intended to broaden and clarify the field of operation of the Federal Act, and provides, in part:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way *directly or closely and substantially*, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce * * *."

The original Act, its construction by this Court, and the amendment of 1939 would all seem conclusively to demonstrate that the burden was upon Respondent to establish

that, in order for the Federal Act to apply, the particular activity or service of deceased and of Respondent at the time of his injuries had, with respect to the instrumentalities upon which he was then in attendance, a real, substantial, close or direct relation to or affect upon interstate transportation; and, therefore, it was error for the Court below to have held, as a matter of law, that an activity or service not in interstate transportation in itself but merely "a reasonable incident or contingency" of another and previous service required to maintain the interstate character of a shipment was in interstate transportation.

The opinion of the Court below misses and disregards the undisputed fact that the engine and tender upon which deceased was in attendance when injured had previously been completely and finally removed and withdrawn from the interstate shipment, that the waybills for the same had been delivered up, and that there remained nothing further to be done in connection with said shipment insofar as were concerned deceased or the crew with which he was associated, or the instrumentalities in their care. If the engine and tender had been, at the time of the injuries, involved in an explosion and completely destroyed, or ceased altogether to function because of a breakdown, the affect on the interstate shipment of ore, and on interstate transportation generally, would have been invisible as far as the evidence shows. That fact alone is highly significant as showing the inapplicability of the Federal Act, whose constitutionality was sustained on the ground that it *fostered the commerce* in which employees and their employing carriers were engaged. *United States v. Lowden*, 308 U. S. 225, 237, 240.

This Court, in applying the rule that activities at the time of the injury, and not other considerations, are the determinative factors of the question of transportation has expressly rejected such reasoning as the Court below adopted and followed. The process by which the Court below reached its decision, if carried to its logical con-

clusion, would result in including within the purview of the Federal Act almost every person in the employ, and every instrumentality in the service, of an interstate carrier by railroad, because practically every employee and instrumentality could be shown to have some *incidental* or *contingent* connection with another employee or instrumentality which, in turn, would at some previous time have been, or at some subsequent time would be, directly involved in interstate transportation, and that such a result was not within the intention of Congress must be conceded (*Boston & M. R. Co. v. Armburg*, 285 U. S. 234). The question here presented is not, of course, the constitutional power of Congress to extend the application of the Federal Act to operations less direct and immediate in their relation to interstate transportation, but only as to the meaning of the Statute Congress has chosen to enact.

In *New York Cent. & H. R. R. Co. v. Carr*, 238 U. S. 260, this Court, speaking through Mr. Justice Lamar, said (p. 263):

> "* * * If the fact that a car had been recently engaged in interstate commerce, or was expected soon to be used in such commerce, brought them within the class of interstate vehicles *the effect would be to give every car on the line that character.* * * *."

In *New York, N. H. & H. R. Co. v. Bezue*, 284 U. S. 415, the state court had held, upon reasoning similar to that employed by the Court below in the instant case, that because an employee when injured was in a service directly related to instrumentalities which themselves were employed in interstate transportation he was, therefore, himself in interstate transportation. In reversing the cause and holding the employee to have been engaged in intrastate work, this Court, through Mr. Justice Roberts, said (p. 419):

> "The test thus applied is broader than our decisions justify. *All work performed in railroad employment may, in a sense, be said to be necessary to the opera-*

tion of the road. * * * But we have held that the mere fact of employment does not bring such employees within the Act. *Delaware, Lack. & West. R. Co. v. Yurkonis,* 258 U. S. 439; *Chicago, B. & Q. R. Co. v. Harrington,* 241 U. S. 177; *Illinois Cent. R. Co. v. Cousins,* 241 U. S. 641; *New York Cent. R. Co. v. White,* 243 U. S. 188, 192; *Industrial Comm. v. Davis,* 259 U. S. 182, 187; *Chicago & N. W. R. Co. v. Bolle,* 284 U. S. 74. ' * * * Under the circumstances of this case, whether the respondent is within the act must be decided not by reference to the kind of plant in which he worked, or the character of labor he usually performed, but by determining whether the locomotive in question was, at the time of the accident, in use in interstate transportation or had been taken out of it."

In *Industrial Commission v. Davis,* 259 U. S. 182, this Court, speaking through Mr. Justice McKenna, said (p. 187):

"* * * The federal act gives redress only for injuries received in interstate commerce. But how determine the commerce? Commerce is movement, and the work and general repair shops of a railroad and those employed in them are accessories to that movement, indeed, are necessary to it, *but so are all attached to the railroad company, official, clerical or mechanical. Against such a broad generalization of relation we, however, may instantly pronounce.* In other words, we are brought to a consideration of degrees, and the test declared, that the employee at the time of the injury must be engaged in interstate transportation or in work so *closely* related to it as to be practically a part of it, in order to displace state jurisdiction and make applicable the federal act."

Mayor v. Central Vermont Ry. Co., 26 F. (2) 905, aff. 26 F. (2) 907 (C. C. A. 2), cert. den. 278 U. S. 624.

5.

As the evidence effectively establishes that, at the time of the injuries, the engine and tender were completely withdrawn from all transportation and their character was wholly intrastate, the Court below was in serious error in holding, as a matter of law, that because the engine and tender had previously been engaged in an interstate haul they subsequently retained an interstate character and were thus still in interstate transportation, where the burden was upon Respondent affirmatively to show the engine and tender to have been in interstate transportation when deceased was injured.

It is clear that, so far as the road engine and tender are concerned, there also could be no *connected service* in any sense between them and the shipment of ore, when deceased was injured, for the obvious reason that at the time of said injuries the shipment had been completely taken in charge by another engine and crew which were moving in the opposite direction. The use of said road engine and tender in all transportation had simply ended when the change in engines was made (see: *Mississippi Cent. R. Co. v. Knight*, 138 Miss. 621, 103 So. 377, cert. den. 269 U. S. 559; *Lawrie v. Atlantic City R. Co.*, 3 N. J. Misc. 267, 127 A. 818; *Geraghty v. Lehigh Valley R. Co.*, 70 F. (2) 300 (C. C. A. 2), 11 F. Supp. 378 (D. C., N. Y.), 83 F. (2) 738 (C. C. A. 2); *McDermott v. Chicago & N. W. Ry. Co.*, 124 Neb. 727, 248 N. W. 59; *Mayer v. Union R. Co.*, 256 Pa. 474, 100 A. 967, cert. den. 243 U. S. 656; *Smith v. Interurban Ry. Co.*, 186 Iowa 1045, 171 N. W. 134, cert. den. 251 U. S. 552; *Louisville & N. R. Co. v. Strange's Admx.*, 156 Ky. 439, 161 S. W. 239; *Delaware L. & W. R. Co. v. Peck*, 225 F. 261 (C. C. A. 2)).

The fallacy of the theory that an intrastate activity may be considered to be in interstate transportation because it is said to be an "incident or contingency" of another service that previously had been interstate in character, and thus bring the matter within the Federal Act, is sharply

demonstrated when consideration is given to the inflexible rule that the *employer* as well as the employee must be shown to have been in interstate transportation. Especially is said theory proven unsound when, as here, the employer's participation in the activity is through instrumentalities which, as such, are not permanently devoted to any kind of traffic, and where, as in the instant case, the evidence shows such instrumentalities to be engaged in intrastate work rather than in interstate transportation.

The burden here was upon Respondent affirmatively to show not only that deceased was, when injured, engaged in interstate transportation within the Federal Act *but also that Respondent itself was so engaged with relation to the same activity in which deceased was participating*, namely the passage of the engine and tender from Canton yards to the storage track and ash pit at Orangeville, *and with respect to the same instrumentalities.* It would seem to be undeniable that if Respondent was not so engaged with particular reference to the work deceased was doing when injured, and with respect to the particular instrumentalities upon which deceased was then in attendance, that deceased may not be considered to have been, when injured, in interstate transportation within the Federal Act.

It is not sufficient that Respondent may have been, at the appropriate time, engaged in interstate transportation involving an activity or instrumentalities other than those deceased was engaged in or employed with, otherwise every interstate carrier by railroad would always be within the Federal Act with relation to all of its employees. But it was essential and required that Respondent meet the burden upon it to show that it also was, with regard to the same activity or service and instrumentalities as those involving deceased, engaged in the requisite interstate transportation. It follows, therefore, that it was indispensable that Respondent affirmatively establish that the engine and tender were, when deceased was injured, engaged in interstate transportation as defined in the Federal Act.

This, it is submitted, Respondent utterly failed to do, although any evidence that may have thrown light on the then character of the engine and tender was exclusively within its power to adduce. The Court below plainly assumed that the engine and tender retained interstate characteristics at the time of the injuries, although the physical circumstances in the evidence pointed to and established an opposite conclusion, and the burden was upon Respondent to show that said engine and tender were interstate in character. Referring to the engine and tender, the Court below said (R. 179):

> "*No new and independent use in any form of transportation* would be begun until their return in charge of the crew to the yards at Bay View for the crew's report and receipt of orders *and thus end the trip.*"

It is implicit in this statement of the Court below that there was to be a new or independent use of the engine and tender in some form of transportation after their return to the yards at Bay View, which finding entirely overlooks the lack of evidence on this point and the fact that, from the evidence before it, the jury had the right to infer that the engine and tender were not to be put to any use but were to be cleaned at the ash pit or stored on the storage track. In direct relation to this situation is the uniform and settled rule that, in the absence of evidence of a future interstate use or movement, an intrastate character attaches to any instrumentality of commerce, or it is presumed to be in no commerce whatever (see: *Baughman v. Grand Trunk Western R. Co.*, 271 Mich. 244, 259 N. W. 897; *Rogers v. Canadian Nat. Ry. Co.*, 246 Mich. 399, 224 N. W. 429, cert. den. 280 U. S. 554; *Lavigne v. Chicago, M. & St. P. R. Co.*, 287 Ill. App. 253, 4 N. E. (2) 785, and cases cited, cert. den. 302 U. S. 688; *Jarvis v. Chicago, B. & Q. R. Co.*, 327 Mo. 428, 37 S. W. (2) 602, cert. den. 284 U. S. 635; *Heffner v. Pennsylvania R. Co.*, 81 F. (2) 28 (C. C. A. 2); *Chicago Junction Ry. Co. v. Industrial Board*, 277 Ill. 512, 115 N. E. 647; *Kraemer v. Chicago & N. W. Ry. Co.*, 148 Minn. 310, 181 N. W. 847, 186 N. W. 392; *McBain v. Northern Pac. Ry. Co.*, 52 Mont. 578, 160 P. 654).

Moreover, and importantly, the language of the Court below definitely shows that its conclusion was that "the trip" in interstate transportation would not end until the return of the engine and tender to the Bay View yards, and thus that the engine and tender were still, at the time of the injuries, devoted to interstate transportation. In this connection Petitioner earnestly maintains, particularly in view of the rule as to burden of proof, that the Court below was indulging in violent assumptions totally unwarranted in the evidence, and that the interstate transportation ended, as the jury found, when the engine and tender were withdrawn from the shipment of ore at Canton yards, and the waybills there delivered up by deceased. This holding of the Court below was, it would seem, plainly in conflict with the established rule of this Court that such instrumentalities may not be presumed to be in any kind of transportation.

In *Minneapolis & St. Louis R. R. Co., v. Winters*, 242 U. S. 353, in holding an employee to have been engaged in intrastate work, this Court, speaking through Mr. Justice Holmes, said (p. 356):

> "This is not like the matter of repairs upon a road *permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic* and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be *repaired* and go on. It simply had finished some interstate business and had not yet begun upon any other. Its next work, *so far as appears*, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time, not upon remote probabilities or upon accidental later events."
>
> *Lehigh Valley R. Co., v. Barlow*, 244 U. S. 183, 184.

It is respectfully submitted to be apparent that, as distinguished from commerce in the strict technical sense of that word, neither deceased nor said engine and tender, nor Respondent with relation thereto, were, at the time of the injuries, engaged in any form of activity or service that may justly be characterized as interstate transportation within the meaning of the Federal Act. They were not then employed in the carriage of any commodity, not even empty cars, and, as pointed out hereinbefore, nothing that did occur or might have occurred in connection with the passage of the engine and tender or the work they were then engaged in would have had the slightest affect upon interstate or any form of transportation. There is not even any evidence in the record that the tracks over which said engine and tender were passing, namely, the so-called No. 2 track from Canton yards to Highland yards, were ever used for the passage of interstate goods.

This Court, in its most recent holdings in cases involving the Federal Act, has stressed the distinction between "commerce" and "transportation" and has definitely ruled that an injured employee, in order to be within said Act, must be shown, together with his employer, to have been at the time of injury engaged in interstate transportation, which has a narrower signification and is distinct from interstate commerce which covers the whole field of which transportation is only a part. Thus it was essential in the case at hand that Respondent affirmatively show by substantial evidence, in order to overcome the presumption to the contrary and to meet the burden of proof upon it, that deceased was, when injured, and that Respondent with respect to its said instrumentalities likewise was, actually engaged in the required interstate "transportation" or in work so closely, not incidentally, contingently or reasonably, related to such transportation as to be practically a part of it.

Relative to that aspect, the attention of this Honorable Court is respectfully and particularly directed to the fact

that the issue submitted to and decided by the State Industrial Accident Commission of Maryland, *at the request of Respondent*, was whether deceased was engaged in interstate "commerce" at the time of his injuries, and to the fact that Respondent's first or demurrer prayer, which the Court below, in reversing the jury's findings, held that the trial Court erred in not granting, contained the request that the trial Court instruct the jury as a matter of law that the evidence in the case showed that deceased was engaged in interstate "commerce" at the time of his death.

In *Chicago & N. W. Ry. Co., v. Bolle*, 284 U. S. 74, in holding an employee to have been in intrastate work when injured, this Court, through Mr. Justice Sutherland, said (p. 77):

> "* * * The character of the work which he did at other times, therefore, becomes immaterial. *Shanks v. Delaware, Lack. & West. R. Co.*, 239 U. S. 556, 558. * * *
>
> "It will be observed that the word used in defining the test is 'transportation', not the word 'commerce'. The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury was engaged in interstate commerce, within the meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it."

Whatever doubt may have existed on the question of the showing required to bring an employee within the Federal Act was fully resolved by this Court in the recent

cases of *Chicago & N. W. Ry. Co. v. Bolle*, *supra*, and *Chicago & E. I. R. Co. v. Industrial Commission*, 284 U. S. 296, in the latter of which the previous holdings of this Court in *Erie R. R. Co. v. Collins*, 253 U. S. 77, and *Erie R. R. Co. v. Szary*, 253 U. S. 86, were definitely overruled. In the two last named cases the holdings were to the effect that the general nature of the work being done instead of the specific duty or act being performed at the time of injury should be the controlling factor in determining whether the employee was engaged in interstate transportation, but in the more recent cases mentioned that view was rejected and the rule pronounced in the *Shanks* and *Harrington* cases was applied.

In *Chicago & E. I. R. Co., v. Industrial Commission*, 284 U. S. 296, in which the state court had affirmed an award to the employee under a state act, this Court, in affirming the state court, emphasized the necessity of the showing of a close or direct relation between the activities of the parties and interstate transportation, and, speaking through Mr. Justice Sutherland, said:

> "* * * From a reading of the opinion in the *Collins* case, it is apparent that the test in the *Shanks* case was not followed (see p. 85), the words 'interstate commerce' being inadvertently substituted for the words 'interstate transportation'. The *Szary* case is subject to the same criticism, since it simply followed the *Collins* case. Both cases are out of harmony with the general current of the decisions of this Court since the *Shanks* case, *Chicago & N. W. Ry. Co. v. Bolle*, 284 U. S. 74, and they are now definitely overruled. The *Harrington* case furnishes the correct rule, * * *."

Under the rule thus declared by this Court to be the correct one, Petitioner respectfully submits that the errors of the Court below are fully demonstrated. The apposite parts of this Court's opinion in the *Harrington* case have already been quoted hereinabove; and in *Shanks v. Delaware, Lack. & West. R. R. Co.*, 239 U. S. 556, this Court, in

holding the injured employee to have been engaged in intrastate work, said, in stating the rule, through Mr. Justice Van Devanter (pp. 557-558):

> "It is essential to a right of recovery under the act not only that the carrier be engaged in interstate commerce at the time of the injury but also that the person suffering the injury be then employed by the carrier in such commerce. And so it results where the carrier is also engaged in *intrastate commerce or in what is not commerce at all*, that one who while employed therein by the carrier suffers injury through its negligence, or that of some of its officers, agents or employees, must look for redress to the laws of the State wherein the injury occurs.
>
> "* * * What his employment was on other occasions is *immaterial*, for, as before indicated, the act refers to *the service being rendered when the injury was suffered.*
>
> "* * * The true test of employment in such commerce in the sense intended is, was the employee at the time of the injury engaged in interstate transportation or in work so *closely* related to it as to be *practically a part of it.*"

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Honorable Court of its powers of review, under the authority hereinabove cited, and that to such an end a writ of certiorari should be granted and this Honorable Court should review the decision of the Court of Appeals of Maryland and finally reverse it.

ISAAC LOBE STRAUS,
Counsel for Petitioner.

AVRUM K. RIFMAN,
Of Counsel.

Baltimore, Maryland,
February 10, 1941.

Office - Supreme Court, U. S.
MAR 12 1941
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 780.

EMMA MAE REELEY, CLAIMANT,
Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD E. HARGEST, JR.,
O. BOWIE DUCKETT, JR.,
Attorneys for Respondent.

The Daily Record Co. Print, Baltimore.

INDEX.

Subject Index

	PAGE.
Short Statement	1
Facts	2-3
Argument	4
Extra Train	9
Conclusion	10

Authorities Cited

Anderson v. Director General, 94 N. J. L. 421	6
Callahan v. Boston & M. R. Co., 79 N. H. 173	7
Ches. & Ohio R. R. Co. v. Kornhoff, 167 Ky. 355	7
Chicago & N. W. R. R. Co. v. Bolle, 284 U. S. 74	4
15 Corpus Juris Sec. page 349	6
Dunkell v. The Pa. R. R. Co., 106 Pa. S. 356	10
Elder v. The Pa. R. R. Co., 118 Pa. S. 137	10
Erie R. R. v. Winfield, 244 U. S. 170	4
Garber v. Missouri Pac. Ry. Co., 210 S. W. 377	7
Graber v. Duluth S. S. & A. Ry., 150 Wis. 414	10
New York Cent. R. R. v. Marcone, 281 U. S. 345	5
New York Cent. R. R. v. Porter, 249 U. S. 168	10
North Carolina R. R. v. Zachary, 232 U. S. 248	6
O'Neill v. Erie R. R., 169 N. Y. Supp. 1008	7
Patterson v. The Pa. R. R. Co., 284 Pa. 577	7
Philadelphia & Reading R. R. v. Hancock, 253 U. S. 284	10
Pipal v. Grand Trunk Western R. Co., 173 N. E. 372	7
Richter v. Chic. M. & St. P. Ry. Co., 186 N. W. 616	7
Roberts, Federal Liability of Carriers, Vol. 2, Sec. 745	6
St. Louis & Santa Fe Ry. Co. v. Seale, 229 U. S. 156	6
Thomas v. The Pa. R. R. Co., 162 Md. 509	7, 10
Wabash Ry. Co. v. Whitcomb, 154 N. E. 885	7
Young v. Chic. R. R. Co., 20 N. E. 2d 320	10

Statutes Cited

Federal Employers Liability Act, 45 U. S. C. A., Sec. 51, et seq.	8
Maryland Workmen's Compensation Act, Annotated Code of Maryland, 1939 Edition	
Article 101	
Section 44	8
Section 70	8

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Short Statement.

In this case, Petitioner seeks a Writ of Certiorari from a unanimous decision of the Court of Appeals of Maryland, which held that a Pennsylvania Railroad Company freight brakeman transporting ore between the states of Pennsylvania and Maryland was engaged in interstate commerce. Freight Brakeman Reeley was killed during his tour of duty while returning for storage the locomotive and tender used in the interstate journey. Under

the circumstances, the Maryland Appellate Court properly denied a claim for compensation filed under the State Compensation Acts.

Facts.

The essential facts of this case are simple and uncontradicted. Said facts are succinctly set forth in the opinion of the Maryland Court of Appeals (R. 175, etc.), 16 Atl. 2d 904, beginning at page 909.

The material facts are as follows: George A. Reeley was a freight brakeman employed by The Pennsylvania Railroad Company. On the morning of November 21, 1937, he left Harrisburg, Pennsylvania, with road locomotive No. 6733 and sixty-three loaded cars of ore, all destined and billed to Canton Piers, Baltimore, Maryland. Attached to the train was also a tender and a cabin car or caboose. The train crew consisted of Conductor Hudson, Engineman Lambie, Fireman Morgan, Flagman Arnold and Brakeman Reeley. En route, one car was set off for repairs and the remaining sixty-two continued on to Baltimore with the same crew throughout the run.

The first station or yard on the route of the freight train into Baltimore is Bay View, the second is Highland Yard (distance approximately one mile from Bay View) and the third is Canton Yard (distance approximately one-half mile from Highland Yard). From the Canton Yard to the ore piers at Canton is approximately a mile. The train reached Bay View about 4.10 p. m. and Highland Yard about 4.45 p. m. on the same day. The cabin car or caboose was cut off at Highland Yard and left with Conductor Hudson and Flagman Arnold. The road locomotive, tender and sixty-two cars then proceeded to

Canton Yard with the remainder of the crew, including Brakeman Reeley, who was in charge. At Canton Yard, the road locomotive was detached from the sixty-two freight cars because its size was such that it could not continue with the train to the Canton ore piers and a yard engine, with another crew, was attached to the draft to move it to its destination. The road locomotive and tender, in charge of Brakeman Reeley, then started a reverse movement for the purpose of picking up the cabin car and the complement of the crew and then moving on to Bay View where the cabin car would be placed on the cabin track and the locomotive on the storage track, after which the crew would turn in their reports and sign off, whereupon their pay for the trip would cease. This was the customary and normal operation (R. 10, 87).

About the time the crew reached Bay View on the return journey and before marking off, it was discovered that Reeley was missing. A search resulted in the finding of his body on the return track between Highland Yard and Canton Yard, several hundred feet south of the point where the cabin car had been left. Reeley was seen to board the locomotive at Canton before its return movement so he was undoubtedly run over by his locomotive just before the coupling to the cabin car was made. This point was within a mile of where his tour of duty ended.

All the railroad records, including the wheel report (R. 13), waybills for each car (R. 21, 97) and time sheets (R. 99 to 108), showing that the entire transaction was interstate, were produced. The claimant produced no witnesses to contradict or dispute these records or the testimony of the train crew and railroad employees, who were in agreement on all phases of the case.

ARGUMENT.

Employment in Interstate Transportation does not end until an employee has completely disassociated himself therefrom.

Under the facts in this case, it is apparent that Brakeman Reeley at the time of his death "was then engaged in interstate transportation or in work so closely related to it as to be practically a part of it", which is the recognized test laid down by this Court. *Chicago & N. W. R. R. Co. v. Bolle*, 284 U. S. 74, at 78, 76 L. Ed. 173, 52 S. C. 59.

The learned opinion of the Court of Appeals written by His Honor Judge Parke (R. 175), 16 Atl. 2d 904, at 909, is not in entire accord with the decisions of this Honorable Court but with the Appellate Courts throughout the Country.

In the case of *Erie R. R. v. Winfield*, 244 U. S. 170, 61 L. Ed. 1057, this Court held to be engaged in interstate commerce a railroad employee one step further removed from interstate transportation than Reeley. Brakeman Reeley was killed while he was returning for storage an engine and tender used to transport an interstate shipment. At the time of his injury, he had not concluded his tour of duty or work for the day.

Winfield had taken his engine to the place where it was to remain for the night and had concluded his work for the day. He was struck and killed by another engine while crossing over certain tracks when leaving the railroad yard. This Court in holding that Winfield was engaged in interstate commerce said:

> "In leaving the carrier's yard at the close of his day's work, the deceased was but discharging a duty

of his employment. See *N. C. R. Co. v. Zachary*, 232 U. S. 248, 260. Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury, his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for the present purposes of no importance.

". . . By the Federal Act, the entire subject, as respects carriers by railroads and their employees in interstate commerce was taken without the reach of state laws."

Likewise, in the case of *New York Cent. R. R. Co. v. Marcone*, 281 U. S. 345, 74 L. Ed. 892, 50 Sup. Ct. 294, this Court held that a round-house employee employed in working upon engines used in hauling interstate trains was engaged in interstate commerce under the provisions of the Federal Employers Liability Act although the employee may have completed his work on the engine shortly before his death.

Mr. Justice Stone, who delivered the opinion of the Court, said:

"But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it as to entitle him to the benefits of the Employers Liability Act."

Obviously, a railroad employee such as Brakeman Reeley, employed in the movement and transportation

of interstate shipments, was more closely engaged in interstate transportation than a shop employee whose sole duty was to lubricate the railroad equipment.

St. Louis and Santa Fe Ry. Co. v. Seale, 229 U. S. 156, 57 L. Ed. 1129:

> "Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."

See also:

N. Car. R. R. Co. v. Zachary, 232 U. S. 248.

The Maryland Court's opinion is supported by the great weight of authority.

15 Corpus Juris Sec., Commerce, page 349, Sec. 51:

> "Employment in interstate transportation begins when a workman on a carrier's premises makes a forward move to serve in that traffic or employment and ends only after he has completely disassociated himself therefrom."

Roberts Federal Liability of Carriers, Vol. 2, 2nd Ed., Sec. 745:

> "A switching movement which constitutes the last lapse of an interstate journey is a part of interstate transportation and employees engaged therein are under the Federal Act."

Anderson v. Director General of Railroads, 94 N. J. L. 421, 110 Atl. 829. In this case, the decedent was a conductor of a freight train and on the day of the accident had brought his train, which contained interstate com-

merce, to its destination but he had yet to deliver his reports to the yard master. On the way to the yard master's office, he boarded an engine and was killed when it collided with another engine. The Court said:

> "Although it is conceded that Anderson while in charge of the train was employed by the defendant in interstate commerce, the contention is that he ceased to be so employed as soon as he left it. But this suggestion is without merit for his duty with relation to the subject matter of transportation was not ended until he had turned over his records to the yard master; and the mere fact that he had left the train in the performance of that duty did not at all change the character of his employment."

Garber v. Missouri Pac. Ry. Co., 210 S. W. (Mo.) 377. In this case, the deceased husband, a locomotive fireman, had completed an interstate journey. The engine had been uncoupled from the train containing interstate commerce and was being placed by the train crew, including the deceased, on a storage track belonging to and used by the defendant in connection with its business as a common carrier, when he was killed. The Court held that Garber was engaged in interstate commerce and that there could be no recovery under the state law.

See also *Thomas v. The Pa. R. R.*, 162 Md. 509, 160 Atl. 793; *O'Neill v. Erie R. R.*, 169 N. Y. Supp. 1008; *Ches. & Ohio R. R. v. Kornhoff*, 167 Ky. 355, 180 S. W. 523; *Callahan v. Boston & M. R. Co.*, 79 N. H. 173, 106 Atl. 37; *Pipal v. Grand Trunk Western R. Co.*, 173 N. E. (Ill.) 372; *Patterson v. The Pa. R. R. Co.*, 284 Pa. 577, 131 Atl. 484, cert. den. 270 U. S. 649; *Wabash Ry. Co. v. Whitcomb*, 154 N. E. (Ind.) 885; *Richter v. Chic. M. & St. P. Ry. Co.*, 186 N. W. (Wis.) 616.

Relief in this case was asserted under the provisions of the Maryland Workmen's Compensation Act (Art. 101, Annotated Code of Maryland). The provisions of the Federal Employers Liability Act (35 Stat. 65; U. S. C. Tit. 45, Sec. 51, et seq.) were not therefore directly involved. The applicable Maryland Statute provides, Art. 101, Sec. 44, Annotated Code of Maryland, 1939 Ed.:

> "The provisions of this Act shall apply to employers and employees engaged in intrastate and also in interstate or foreign commerce, for whom a rule of liability or method of compensation has been established by the Congress of the United States. *only to the extent that their mutual connection with the intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce. . . .*" (Italics ours.)

After a full hearing, the State Industrial Accident Commission disallowed the compensation claim of Petitioner (R. 82). As the decision of the State Industrial Accident Commission was in favor of the employer, the statutory burden of proof on appeal to the Superior Court of Baltimore City was upon the claimant as the Maryland Compensation Statute provides, Art. 101, Sec. 70, Annotated Code of Maryland, 1939 Ed.:

> ". . . In all court proceedings under or pursuant to this Article, the decision of the Commission shall be prima facie correct and the burden of proof shall be upon the party attacking the same."

The Nisi Prius Court in submitting the question to the jury recognized this Section of the Compensation Statute in granting Respondent's Second Prayer (R. 144).

On appeal, the Court of Appeals of Maryland reversed the jury's finding and said:

(R. 178) "On consideration, it is obvious that every operation of the crew of the freight train after the yard engine was coupled to the line of freight cars was caused by their interstate transportation and in direct and proximate relation to it . . ."

(R. 180) "Thus, the service in which the brakeman had been and was employed at the time was primarily in the forwarding of interstate commerce and that the mode of this connected service at the time of the accident was a reasonable incident or contingency of the completeness of the service." (Citing numerous cases.)

Facts concerning employment not in controversy and therefore the question of Interstate Commerce properly determined by the Court.

The material facts in this case are uncontradicted and undisputed and show conclusively that Reeley (1) on November 21, 1937 was a member of the train crew moving in interstate commerce between Harrisburg, Pennsylvania, and Baltimore, Maryland; (2) that he, with other members of the crew, delivered the sixty-two cars of ore at Canton shortly after 5.00 p. m.; (3) that he met his death while returning to the storage track the same locomotive and tender used on the interstate trip; (4) that at the time of the accident, his tour of duty had not terminated, the train records had not been delivered nor was he permitted to sign off until this work was completed (R. 30, 38, 88, 91, 92, 93, 110, 143); (5) that Reeley, as well as the other crew members, was paid for his time until signing off at Bay View and had been paid on this basis for years (R. 144 and see time sheets R. 99 and 105); (6) that the return movement was the customary and normal operation (R. 10, 40, 87, 176).

Petitioner in her brief attempts to put a strained construction on the words "extra train". An extra train,

as shown by the testimony, means nothing more than that the freight train did not travel on regular schedule (R. 36) and is of no significance in the determination of the present inquiry.

It is well established that where the essential facts concerning employment are not in controversy, the question of interstate commerce should be determined by the court. *Philadelphia & Reading R. Co. v. Hancock*, 253 U. S. 284, 64 L. Ed. 907, 40 S. C. 512; *New York C. R. Co. v. Porter*, 249 U. S. 168, 169, 63 L. Ed. 537; *Young v. Chic. R. R. Co.*, 20 N. E. 2d 320, 299 Ill. App. 393; *Dunkell v. The Pa. R. R. Co.*, 106 Pa. S. 356, 163 Atl. 70, cert. den. 289 U. S. 727, 53 S. C. 527; *Elder v. Pa. R. R. Co.*, 118 Pa. Sup. 137, 180 Atl. 183; *Thomas v. The Pa. R. R. Co., supra; Graber v. Duluth S. S. & A. Ry.*, 150 Wis. 414, 150 N. W. 489.

CONCLUSION.

In conclusion, it is submitted that the Petition for a Writ of Certiorari should be denied because (a) the unanimous opinion of the Court of Appeals of Maryland is in accord with the applicable decisions of this Court; (b) no clear or palpable error is set forth in the Petition for Writ of Certiorari; (c) Petitioner's brief does not comply with Rule 38 of this Honorable Court in that said brief is not direct and concise; (d) that there is no special or important reason for the granting of a Writ of Certiorari.

Respectfully submitted,

EDWARD E. HARGEST, JR.,
O. BOWIE DUCKETT, JR.,
Attorneys for Respondent.